Chai Yee Chong v Lew Thai

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A–02–476 OF 1999

ABDUL HAMID MOHAMAD, MOHD NOOR AHMAD FCJJ AND ABDUL AZIZ MOHAMAD JCA

26 MARCH 2004

Damages (Personal Injury or Death) — Special damages — Loss of earnings — Plaintiff continued to work as tractor driver after accident — Plaintiff able to earn more after accident — Whether plaintiff suffered loss of earning capacity

Damages (Personal Injury or Death) — Special damages — Medical expenses — Treatment at private hospital — Whether reasonable that plaintiff sought or received treatment at private hospital— Whether plaintiff entitled to recover expenses incurred for medical treatment at private hospital

Tort — Negligence — Accident at work — Liability of co-worker — Plaintiff instructed by defendant co-worker to build embankment to prevent flooding of mine — Mine wall collapsed — Whether defendant co-worker negligent in failing to ask plaintiff to stop work — Duty of care to act affirmatively to protect person from injury — Whether there must be something occurring after plaintiff had been placed in foreseeably risky position that would bring an obligation on defendant's part to act affirmatively to protect plaintiff

The plaintiff was an employee of a company which operated a tin mine. The defendant was the manager and director of the company. The plaintiff was instructed by the defendant to build an embankment to prevent the rising water from flooding the mine, and whilst he was building the embankment, the mine wall collapsed and as a result of which the plaintiff was buried and suffered serious injuries and damages. The cause of the collapse of the bund was not established. The plaintiff originally sued the company as the employer of the plaintiff, and the defendant as the servant or agent of the employer. Subsequently, the claim against the employer was discontinued as not maintainable under the Employees' Social Security Act 1969, and the writ and statement of claim were amended so that the action was maintained only against the defendant as a co-employee of the plaintiff. On the issue of liability, the learned High Court judge held, inter alia, that the defendant had failed to take any precaution for the safety of the plaintiff by failing to ask the plaintiff to stop work and in failing to tell the plaintiff not to drive a tractor to raise the height of the bund over which the flood water flowed and as such was negligent. On damages, the issues raised concerned the award for medical expenses at a private hospital and loss of earning capacity. The plaintiff was hospitalised for 73 days at the Ipoh General Hospital where he underwent one major operation to his hand. The plaintiff was admitted to a private hospital four days after his discharge from the Ipoh General Hospital and at the private hospital, a muscle flap and skin graft operation was done to his right leg and he was discharged. He was re-admitted to the private hospital where he underwent a vasculorized pedicle fibular graft and bone graft operation to bridge the bone gap in the right tibia. A third operation was done to remove screws, dead bone and necrotic tissue from the right leg.

Garamycin beads were inserted along the infected right tibia. The learned High Court judge allowed both these awards. This was the defendant's appeal.

Held, allowing the appeal:

(1) (per **Abdul Hamid Mohamad FCJ**) There was a special relationship between the plaintiff and the defendant and there was a duty of care on the part of the defendant towards the appellant. However, on the facts on this case, it would not be reasonable to find negligence on the part of the defendant for allowing or for not stopping the plaintiff from doing the work he was doing at the time of the accident. The question to ask was whether a reasonable man would think that to do the work at the time of the accident under the conditions then prevailing was so dangerous that to allow the plaintiff to do it or not to stop him from doing it constituted negligence. In the instant case, the defendant himself took out a tractor under similar conditions and was doing the same type of work himself. This showed that to do the work under such conditions was not so inherently dangerous that the defendant himself would not do it (see paras 15–16).

(2) (per **Abdul Hamid Mohamad FCJ**) If the treatment was sought at a government hospital, the full amount expended and paid by the person should be awarded. However, if the plaintiff had sought treatment at a private hospital, he had to first prove that he was justified in seeking treatment at the private hospital. In this regard, he must prove that: (a) the particular treatment was not available at the government hospital either due to the unavailability of the necessary equipment, qualified doctors or other sufficient reasons; or (b) although the treatment was available at a general hospital, it was not available within a reasonable period considering the urgency of the treatment; or (c) the treatment at the government hospital, though available, was grossly inadequate. If the court was not satisfied that the plaintiff was justified in seeking treatment at a private hospital, then, depending on the facts and the circumstances of each case, the court should either dismiss the claim altogether or award an amount not exceeding one-third of the expenses. This one-third amount was not fixed by any written law but was arrived at as a matter of practice. If it was shown that even one-third was excessive, considering the expenses that otherwise would have been incurred in a government hospital, an amount less than one-third may be awarded. Secondly, the plaintiff had to prove that the amount incurred was reasonable taking into consideration normal charges at other local private hospitals. The court may award what it considered to be a reasonable amount which may even be the full amount claimed (see paras 59–61).

(3) (per **Abdul Hamid Mohamad FCJ**) In the instant case, there was ample evidence to show that the plaintiff was justified in obtaining medical treatment at the private hospital. During his stay at the Ipoh General Hospital, no operation was done to his leg. Instead, he was discharged to follow up weekly at the clinic only for wound inspection. In the circumstances, had liability been found in the plaintiff's favour, he would have been awarded the full amount of RM15,028 for medical expenses (see paras 66–68).

(4) (per **Abdul Hamid Mohamad FCJ**) The plaintiff was a tractor driver at the time of the accident and he was able to work and indeed worked as a tractor driver with a number of employers after the accident and was earning more than before the accident. In the circumstances, he had not suffered any loss of earning capacity (see para 71).

(5) (per **Abdul Aziz Mohamad JCA**) When it came to a duty of care to act affirmatively to protect someone from injury because one had placed him in a position in which it was foreseeable that he might be injured, it was not sufficient to prove that the plaintiff was placed in such a position and that the injury that was foreseeable occurred. That would be arguing for a duty of care not to do something to cause injury. For there to be a duty of care to act affirmatively to protect, there must be something occurring after the plaintiff had been placed in such a foreseeably risky position that would bring on the obligation on the defendant's part to act affirmatively to protect the plaintiff. In this case, there was no such occurrence. From the time when the defendant asked the plaintiff to raise the height of the bund to the time that the bund collapsed, there was no evidence, for example, that the defendant had received some indication that the bund was likely to collapse, so that it might be said that he was obliged to act affirmatively and tell the plaintiff to stop work and leave the bund (see para 88).

(6) (per **Abdul Aziz Mohamad JCA**) In any case, there was no proof that the collapse of the bund was foreseeable. So it was not a case of the defendant being responsible for placing the plaintiff in a position in which it was foreseeable that he might be injured. But, more importantly, even if it were such a case, there was no evidence of something occurring after the plaintiff had been placed in such a foreseeably risky position that would give rise to a duty on the defendant's part to act affirmatively to protect the plaintiff (see para 86).

(7) (per **Abdul Aziz Mohamad JCA**) The learned judge did not expressly state a finding that the defendant owed a duty of care to the plaintiff, defining its nature and stating the basis for holding that there was such a duty of care. But to find, as he did, that the defendant was liable, he must have first found that there was a duty of care. However, there was nothing in the law that was considered by the trial judge that would warrant a finding, on the facts of this case, that the defendant owed a duty of care to the plaintiff. The trial judge therefore erred in finding that there was a duty of care and that the defendant was liable for having breached it (see para 90).

(8) (per **Abdul Aziz Mohamad JCA**) On the basis of the evidence furnished by the medical reports, the private hospital had given a more thorough treatment to the plaintiff's right leg, and treatment of a better kind than the government hospital had given, and this constituted proof after the event of the reasonableness of the plaintiff's resort to the private hospital. The best and safest guide was always to bear in mind the basic principle that a plaintiff was entitled to recover all expenses reasonably incurred for medical treatment as a result of his injuries, just as he was entitled

to recover all other expenses so incurred. Therefore, if it was reasonable that a plaintiff sought or received treatment, whether from the outset or midway, at a private hospital instead of a government hospital, or at a particular private hospital instead of at some other private hospital, or at a private hospital abroad instead of locally, then he was entitled to recover the expenses incurred for medical treatment at the private hospital. Whether it was reasonable that he had sought or received medical treatment at the private hospital must depend on the facts and circumstances of the case. Also, it would not be wise to lay down a guide as to the circumstances in which it would be reasonable for a plaintiff to seek or receive treatment at a private hospital as one simply cannot foresee the likely ramification of circumstances. The law as to what is reasonable must be allowed to develop as cases are decided in the light of their own particular and peculiar circumstances (see paras 104, 106).

(9) (per **Abdul Aziz Mohamad JCA**) If resort to or receipt of treatment at a private hospital was unreasonable, the plaintiff would not be completely disentitled to the medical expenses incurred as a portion of the medical expenses, which was not necessarily one-third of the medical expenses, was allowable (see para 112).

(10) (per **Abdul Aziz Mohamad JCA**) As to loss of future earnings, the evidence showed that the plaintiff's injuries did not affect his work as a tractor driver and after his recovery, he was earning more as a tractor driver than he had been earning in the mine where he was injured. As such, there should have been no award for loss of future earnings (see para 120).

[Bahasa Malaysia summary

Plaintif adalah seorang pekerja sebuah syarikat yang menjalankan lombong timah. Defendan adalah pengurus dan pengarah syarikat tersebut. Plaintif telah diarahkan oleh defendan untuk membina sebuah empangan untuk menghalang air daripada naik dan melimpah ke dalam lombong tersebut, dan semasa beliau membina empangan tersebut, dinding lombong tersebut telah runtuh dan akibat daripada itu plaintif telah tertimbus dan mengalami kecederaan dan kerosakan yang serius. Sebab keruntuhan benteng tersebut tidak dapat dibuktikan. Plaintif pada asalnya telah menyaman syarikat tersebut sebagai majikan plaintif, dan defendan sebagai pekerja atau ejen majikan. Berikutan itu, tuntutan terhadap majikan tidak diteruskan kerana ia tidak boleh dikekalkan di bawah Akta Keselamatan Sosial Pekerja 1969, dan writ dan pernyataan tuntutan telah dipinda agar tindakan boleh dikekalkan hanya terhadap defendan sebagai majikan bersama plaintif. Berhubung persoalan liabiliti, hakim Mahkamah Tinggi memutuskan, antara lain, bahawa defendan telah gagal untuk mengambil apa-apa langkah keselamatan terhadap plaintif kerana gagal memberitahu plaintif supaya tidak memandu trak untuk menambahkan ketinggian benteng di mana air melimpah dan oleh itu adalah cuai. Berhubung kerosakan, persoalan-persoalan yang timbul adalah berkaitan award untuk perbelanjaan perubatan di hospital swasta dan kehilangan kapasiti mendapat mata pencarian. Plaintif telah dirawat selama 73 hari di Hospital Besar Ipoh di mana beliau menjalani

satu pembedahan besar ke atas tangan beliau. Plaintif telah dimasukkan ke hospital swasta empat hari selepas beliau keluar daripada Hospital Besar Ipoh dan di hospital swasta tersebut, satu pembedahan otot yang tersiat dan graf kulit telah dilakukan ke atas kaki kanan beliau dan beliau dibenarkan keluar. Beliau telah dimasukkan semula ke hospital swasta di mana beliau menjalani satu pembedahan graf pembuluh pedisel tulang betis dan graf tulang di bahagian kanan tibia. Satu pembedahan ketiga telah dilakukan untuk mengeluarkan skru-skru, tulang yang telah mati dan tisu nekrotik dari kaki kanan. Manik-manik garamycin telah dimasukkan sepanjang tibia kanan yang rosak. Hakim Mahkamah Tinggi yang bijaksana telah membenarkan kedua-dua award tersebut. Ini adalah rayuan defendan.

Diputuskan, membenarkan rayuan tersebut:

(1) (oleh **Abdul Hamid Mohamad HMP**) Terdapat hubungan istimewa antara plaintif dan defendan dan terdapat satu kewajipan berjaga-jaga di pihak defendan terhadap perayu. Namun begitu, berdasarkan fakta kes ini, ia tidak munasabah untuk mendapati kecuaian di pihak defendan kerana telah membenarkan atau kerana tidak menahan plaintif daripada membuat kerja yang beliau lakukan pada masa kemalangan tersebut berlaku. Persoalannya adalah sama ada seorang yang waras akan berfikiran bahawa dengan membuat kerja tersebut pada masa kemalangan berdasarkan keadaan pada masa itu adalah amat merbahaya dan untuk membenarkan plaintif melakukannya atau tidak menahannya daripada melakukannya akan membentuk kecuaian. Dalam kes semasa, defendan sendiri telah memandu trak dalam keadaan yang sama dan melakukan jenis kerja yang sama. Ini menunjukkan bahawa untuk melakukan kerja tersebut dalam keadaan sedemikian tidaklah dengan sendirinya merbahaya yang mana defendan sendiri tidak akan melakukannya (lihat perenggan-perenggan 15–16).

(2) (oleh **Abdul Hamid Mohamad HMP**) Sekiranya rawatan dilakukan di sebuah hospital kerajaan, jumlah penuh yang dibelanja dan dibayar oleh seseorang itu hendaklah diawardkan. Namun begitu, sekiranya plaintif telah mendapat rawatan di sebuah hospital swasta, beliau terlebih dahulu perlu membuktikan bahawa beliau dapat memberi justifikasi dalam memperoleh rawatan di hospital swasta. Dalam hal sedemikian, beliau perlu membuktikan bahawa: (a) rawatan tertentu tersebut tidak disediakan di hospital kerajaan sama ada disebabkan ketiadaan peralatan lengkap, doktor-doktor yang berkelayakan atau sebab-sebab lain yang mencukupi; atau (b) walaupun rawatan tersebut disediakn di hospital kerajaan, ia tidak dapat disediakan dalam tempoh yang munasabah memandangkan tindakan perhatian segera rawatan; atau (c) rawatan di hospital kerajaan, walaupun disediakan, tidak mencukupi langsung. Sekiranya mahkamah tidak berpuas hati bahawa plaintif diberi justifikasi dalam mendapat rawatan di hospital swasta, maka bergantung kepada fakta-fakta dan keadaan-keadaan setiap kes, mahkamah hendaklah sama ada menolak tuntutan tersebut sama sekali atau mengawardkan sejumlah tidak lebih daripada satu pertiga daripada perbelanjaan. Jumlah satu pertiga tersebut tidak ditetapkan oleh mana-mana undang-undang bertulis

tetapi diputuskan melalui amalan. Sekiranya ia dapat ditunjukkan bahawa jumlah satu pertiga tersebut juga adalah melampau, dengan mengambilkira perbelanjaan yang sebaliknya dibelanjakan dalam sebuah hospital kerajaan, satu jumlah yang kurang daripada satu pertiga boleh diawardkan. Keduanya, plaintif telah membuktikan bahawa jumlah yang dibelanjakan adalah munasabah dengan mengambilkira caj biasa di hospital swasta lain. Mahkamah boleh mengawardkan apa yang difikirkan jumlah yang munasabah yang mungkin boleh merupakan jumlah penuh yang dituntut (lihat perenggan-perenggan 59–61).

(3) (oleh **Abdul Hamid Mohamad HMP**) Dalam kes semasa, terdapat keterangan mencukupi untuk menunjukkan bahawa plaintif diberi justifikasi dalam mendapat rawatan perubatan di hospital swasta. Semasa berada di Hospitak Besar Ipoh, tiada pembedahan telah dilakukan ke atas kaki beliau. Sebaliknya, beliau dibenarkan pulang dan datang setiap minggu ke klinik sahaja untuk membersihkan luka. Dalam keadaan sedemikian, sekiranya liabiliti didapati berpihak kepada plaintif, beliau sepatutnya diawardkan dengan jumlah penuh sebanyak RM15,028 untuk perbelanjaan perubatan (lihat perenggan-perenggan 66–68).

(4) (oleh **Abdul Hamid Mohamad HMP**) Plaintif adalah seorang pemandu trak semasa kemalangan berlaku dan beliau mampu bekerja dan sememangnya bekerja sebagai pemandu trak dengan beberapa orang pekerja selepas kemalangan tersebut dan mendapat pendapatan lebih daripada sebelum kemalangan tersebut. Dalam keadaan sedemikian, beliau tidak kehilangan kapasiti mendapat mata pendapatan (lihat perenggan 71).

(5) (oleh **Abdul Aziz Mohamad HMP**) Apabila bercakap tentang kewajipan berjaga-jaga untuk bertindak dengan tegas untuk melindungi seseorang daripada kecederaan kerana seseorang itu telah meletakkan dirinya dalam keadaan yang boleh diramal bahawa beliau mungkin akan cedera, ia tidak mencukupi untuk membuktikan bahawa plaintif diletakkan dalam keadaan sedemikian dan bahawa kecederaan yang boleh diramal telah berlaku. Itu merupakan hujah tentang satu kewajipan berjaga-jaga dan bukan berbuat sesuatu untuk menyebab kecederaan. Ini adalah kerana untuk satu kewajipan berjaga-jaga wujud untuk bertindak dengan tegas supaya dapat melindungi, perlu ada sesuatu berlaku selepas plaintif diletakkan dalam kedudukan berisiko yang boleh diramal yang akan memerlukan obligasi di pihak defendan untuk bertindak secara tegas agar dapat melindungi plaintif. Dalam kes ini, tidak berlaku sedemikian. Daripada saat apabila defendan menyuruh plaintif menaikkan ketinggian benteng tersebut sehingga saat benteng tersebut runtuh, tiada keterangan, sebagai contohnya, yang defendan telah menerima apa-apa petanda bahawa benteng tersebut berkemungkinan akan runtuh, supaya ia boleh dikatakan bahawa beliau mempunyai tanggungjawab untuk bertindak dengan tegas dan memberitahu plaintif untuk berhenti kerja dan meninggalkan benteng tersebut (lihat perenggan 88).

(6) (oleh **Abdul Aziz Mohamad HMR**) Dalam apa-apa kes, tiada bukti menunjukkan bahawa keruntuhan benteng tersebut dapat diramal.

Oleh itu ia bukan suatu kes di mana defendan adalah bertanggungjawab kerana meletakkan plaintif dalam keadaan di mana ia boleh diramal bahawa beliau mungkin mendapat kecederaan. Tetapi, lebih penting lagi, jika tiada keterangan tentang sesuatu berlaku selepas plaintif diletakkan dalam kedudukan berisiko yang boleh diramal yang akan menimbulkan satu kewajipan di pihak defendan untuk bertindak dengan tegas untuk melindungi plaintif (lihat perenggan 86).

(7) (oleh **Abdul Aziz Mohamad HMR**) Hakim yang bijaksana tidak dengan jelas menyatakan satu penemuan bahawa defendan mempunyai kewajipan berjaga-jaga ke atas plaintif, dengan mentafsirkan sifatnya dan menyatakan asas memutuskan bahawa terdapat kewajipan berjaga-jaga sedemikian. Tetapi untuk mendapati, sebagaimana beliau lakukan, bahawa defendan adalah bertanggungjawab, beliau perlu terlebih dahulu mendapati bahawa terdapat satu kewajipan berjaga-jaga. Namun begitu, tiada apa-apa di sisi undang-undang yang telah dipertimbangkan oleh hakim perbicaraan yang akan mewarankan satu penemuan, berdasarkan fakta kes ini, bahawa defendan mempunyai satu kewajipan berjaga-jaga terhadap plaintif. Hakim perbicaraan oleh itu telah terkhilaf dalam memutuskan bahawa terdapat satu kewajipan berjaga-jaga dan bahawa defendan adalah bertanggungjawab kerana telah melanggarnya (lihat perenggan 90).

(8) (oleh **Abdul Aziz Mohamad HMR**) Berdasarkan keterangan yang dikemukakan oleh laporan perubatan, hospital swasta telah memberikan rawatan terperinci ke atas kaki kanan plaintif, dan rawatan yang lebih baik daripada hospital kerajaan dapat berikan, dan ini membentuk bukti selepas kejadian kemunasabahan plaintif ke hospital swasta. Panduan terbaik dan selamat adalah untuk sentiasa prihatin tentang prinsip am yang plaintif berhak untuk mendapat semula semua perbelanjaan yang dibelanjakan dengan munasabah untuk rawatan perubatan akibat daripada kecederaan beliau, sama seperti jika beliau berhak untuk mendapat semula semua perbelanjaan lain yang telah dibelanjakan. Oleh itu, sekiranya ia munasabah untuk plaintif mendapat atau menerima rawatan, sama ada pada permulaannya taua separuh jalan, di hospital swasta dan bukan di hospital kerajaan, atau di hospital swasta tertentu dan bukan di hospital swasta lain, atau di hospital swasta luar negara dan bukan tempatan, maka beliau berhak untuk mendapat semula perbelanjaan yang telah dikenakan untuk rawatan perubatan di hospital swasta berkenaan. Sama ada ia adalah munasabah untuk beliau mendapat atau menerima rawatan perubatan di hospital swasta hendaklah bergantung kepada fakta-fakta dan keadaan-keadaan kes. Juga, ia tidak wajar untuk memberi panduan berhubung keadaan di mana ia adalah munasabah untuk plaintif mendapat atau menerima rawatan di hospital swasta jika seseorang itu tidak boleh meramal kemungkinan kesan yang merumitkan keadaan. Undang-undang berhubung apa yang munasabah harus dibenarkan berkembang kerana kes-kes diputuskan berdasarkan keadaan-keadaan tertentu dan terperinci masing-masingnya (lihat perenggan-perenggan 104, 106).

(9) (oleh **Abdul Aziz Mohamad HMR**) Sekiranya dengan mendapat atau memperoleh rawatan di sebuah hospital swasta adalah tidak munsabah, plaintif tidak sepenuhnya tidak berhak mendapat perbelanjaan perubatan yang telah dibelanjakan sebagai sebahagian daripada perbelanjaan perubatan, yang tidak semestinya satu pertiga daripada perbelanjaan perubatan, yang dibenarkan (lihat perenggan 112).

(10) (oleh **Abdul Aziz Mohamad HMR**) Berhubung kehilangan mata pencarian masa hadapan, keterangan menunjukkan bahawa kecederaan plaintif tidak menjejaskan kerja beliau sebagau pemandu trak dan selepas beliau pulih, beliau memperoleh pendapatan lebih sebagai pemandu trak daripada apa yang beliau telah perolehi di lombong di mana beliau cedera. Oleh itu, tidak sepatutnya ada award untuk kehilangan mata pencarian masa hadapan (lihat perenggan 120).]

Notes

For cases on accident at work under negligence, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 593–653.
For cases on loss of earnings under special damages, see 6 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1709–1712.
For cases on medical expenses under special damages, see 6 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1713.
For negligence and breach of statutory duty, see 5 *Halsbury's Laws of Malaysia* paras [80.122]–[80.232].

Cases referred to

Carmarthenshire County Council v Lewis CC [1955] AC 549 (refd)
Chin Lin Soon v Mat Daud bin Mat Zain & Anor [1996] MLJU 346 (refd)
Chong Chee Khong & Anor v Ng Yeow Hin [1997] 5 MLJ 786 (refd)
Chong Kam Seng v Herman bin Baharuddin [1992] 2 CLJ 413 (refd)
Ellis v Home Office [1953] 2 All ER 149 (refd)
Harcharan Singh a/l Saudagar Singh v Hassan bin Ariffin [1990] 2 CLJ 393 (refd)
Hehir v Harvey [1949] SASR 77 (refd)
Hj Ariffin Hj Ismail v Mohamad Noor Mohamad [2001] 2 CLJ 609 (refd)
Johnson v Rea Ltd [1962] 1 QB 373 (refd)
Lew Thai v Chai Yee Chong [1997] 5 MLJ 762 (refd)
Lim Wee Heong dan satu lagi Iwn Nai Wah Hing dan satu lagi [1996] MLJU 394 (refd)
Mooi Kim Ming & Anor v Tang Sia Bak [1988] 2 CLJ 797 (refd)
Ng Aik Kian & Anor v Siah Loh Sia [1997] MLJU 143 (refd)
Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor [1988] 1 MLJ 19 (refd)
Peraganathan a/l Karpaya v Chong Yuk Sang & Anor [1995] MLJU 246, [1996] 1 CLJ 622 (refd)
Romuloo a/l Appalasamy & Anor v Tan Seng Kee & Anor [2000] 5 MLJ 655 (refd)
Sambu Pernas Construction & Anor v Pitchakkaran [1982] 1 MLJ 269 (refd)
Suriyati bte Takril v Mohan a/l Govindasamy & Anor [2001] 2 MLJ 275 (refd)
Tajuddin bin Sheikh Daud v Wong Kin Yin [1989] 2 CLJ 237 (refd)
Tang Sia Bak v Mooi Kin Meng & Anor Civil Appeal No 249 of 1987, Supreme Court (refd)
Yaakub Foong v Lai Mun Keong & Ors [1986] 2 MLJ 317 (refd)

Legislation referred to

Employees' Social Security Act 1969

Appeal from: Civil Suit No P 1107/83 (High Court, Ipoh)

V Vijayasegaran (Maxwell Kenion Cowdy & Jones) for the appellant.
R Siva Dharma (Sharmini Navaratnam with him) (Mathew Thomas & Liew) for the respondent.

Abdul Hamid Mohamad FCJ:

[1] The respondent (plaintiff in the High Court) sued the appellant for damages for negligence on the part of the appellant. The learned judge (as he then was) gave judgment for the respondent. The appellant appealed to this court. We allowed the appeal with costs in this court and in the court below.

[2] Both the appellant and respondent were employed by Chai Kim Kong & Sons Sdn Bhd ('the company'). The appellant was employed as a manager of the company for 15 years prior to the accident. He was also a director of the company which was owned by his father.

[3] The respondent was employed by the company for 16 years before the accident. He was at first employed as a tractor driver but was promoted to be a 'kepala' about three months before the accident.

[4] It was raining heavily on the day of the accident and the town of Malim Nawar in which the tin mine in question was situated was flooded partially.

[5] According to the respondent, after dinner, he went to the mine and saw that water in the mine pit was rising. He informed the appellant. The appellant took him in a land rover to the kongsi house. There the appellant and the respondent each took out a tractor 'to do the work' in connection with the rising water.

[6] The respondent drove a tractor to the bund. On one side of the bund was the mining pit and on the other side there was an existing mining pool. The respondent started working by increasing the level (ie height) of the part of the bund where flood water was flowing over the bund into the mining pit. It was dark. There was no light except for the light of the tractor he was driving. The bund was built of sand and it was broad enough for a lorry or a tractor to be driven on it. His tractor's weight was 10 tons.

[7] At that time, the appellant was doing similar work nearer the 'kongsi' house.

[8] The respondent increased the height of the bund by taking sand from the side of the mine and putting it on top of the bund with his tractor. While reversing his tractor to get more sand, the bund collapsed. The tractor fell into the mining pit. He was pinned down by the tractor. He shouted for help and was rescued by the workers. He suffered injuries.

[9] The appellant had claimed and had received compensation under the Employees' Social Security Act 1969. The present claim is against the respondent as a co-employee for negligence for an 'omission to do some act or acts.

[10] The learned judge held that an action lies against a co-employee. The learned judge relied on the judgment of the Federal Court in *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269. The learned judge noted that the amendment to the Employees' Social Security Act 1969 that bars a claim against a fellow-employee that came into force on 1 July 1992 (vide Employees' Social Security (Amendment) Act 1992) was not applicable as the accident happened and the action was filed long before that date. That issue was not taken before us, I agree with the learned judge.

[11] On the issue of liability, the learned judge said in *Lew Thai v Chai Yee Chong* [1997] 5 MLJ 762 (at pp 772–775):

> Very generally, inter alia, in connection with negligence, the general duty of care is that one must take care not to cause injury or damage to one's neighbour, (neighbour as explained in *Donoghue v Stevenson* [1932] AC 562).
>
> On the other hand, the law does not impose a general duty of care to save the neighbour from such injury or damage for which one is not responsible, save in one exception. Barring the exception, and carried to its logical conclusion, it has been said that a bystander can watch a small child drown in one foot of water without doing anything to save the child, and yet he will not have incurred any civil liability for damages, though he will be, of course, roundly condemned by all right thinking-members of society and will have to be answerable to God in due course. The law has never imposed a duty on anyone to be a 'do-gooder' or a good Samaritan.
>
> …
>
> To continue, the exception above-mentioned is when there is a special relationship between the parties, (independently of any contractual relationship of course), where the law will impose such a duty of care in regard to such failure or neglect to save one's neighbour from injury or damage even where one is not responsible for such injury and damage to such neighbour.
>
> When such special relationship arises, the law will impose a duty of care of a special kind, it being a duty to act affirmatively to protect the said neighbour or plaintiff from such injury or damage. Such duty to protect the plaintiff, or for that matter, such special relationship arises, it appears, from certain situations when, eg. the defendant is responsible for placing the plaintiff in a position in which it is forseeable that the plaintiff may be injured; or where the plaintiff creates a danger, even though innocently, he has failed to take steps to remedy or prevent it, see *Johnson v Rea Ltd* [1962] 1 QB 373 (about slippery floor causing a fall). The situations just stated are not conclusive, but any other situation, to give rise to such special relationship ought to be of a similar nature, the essence being on danger.
>
> Thus generally speaking, in other words, when any such situation exists to give rise to such duty to protect the plaintiff, the special relationship between the plaintiff and the defendant comes into being. Such special relationship has been held to arise in a good number of cases, just to give some other examples, eg between a carrier and a passenger; and in *Ellis v Home Office* [1953] 2 All ER 149 (about assault on a fellow-prisoner). There was *Carmarthenshire Country Council v Lewis CC* [1955] AC 549 about a 4-year old boy of a nursery school under the management of the local authority, running onto a public highway in temporary absence of the teacher, causing a fatal accident to some driver who tried to avoid the boy.

Lastly, in regard to the standard of the duty of care on a defendant in connection with the duty to protect the plaintiff imposed by law, from such actionable omission it is equivalent to or is demonstrated by what the plaintiff has to prove, according to a test laid down by *Lord Dunedin in Morton v William Dixon Ltd* (1909) CS 807, at p 899; 'either (a) to show that the thing the defendant did not do was a thing commonly done by other persons in like circumstances or (b) to show that it was a thing which was so obviously wanted that it would be a folly in anyone to neglect to provide it'. In so showing, the obviousness stated above must be such as appears to a prudent and reasonable man, see *Paris v Stepney Borough Council* [1951] AC 367, at p 382 which approved and adopted the dictum of Lord Dunedin. The word 'folly' above-mentioned refers to something which is imprudent or unreasonable, see *Cavanagh v Ulster Weaving Co* [1960] AC 145, at p 162 in which both Morton and Paris were approved.

The court may just as well mention here, if it is of some help, that on a given set of facts which attract the operation of the above principles, plaintiff may sue, of course, on the basis of such principles, but he may be able also to sue concurrently or in the alternative, on the basis of some other specific tort involving sometimes substantially similar principles such as an occupier's liability to an invitee or licensee etc. Overlapping of the laws exists in many fields.

To revert to the evidence and bearing in mind the applicable general principles stated above, I am satisfied, that there was fairly heavy rain on that day from 2pm right up to about 8pm when the mining town of Malim Nawar in which the mine was situated was even flooded partially.

I am further satisfied that there was flood water overflowing the bund and into the mining hole of the tin mine in question, and the plaintiff informed the defendant who was his superior at the mine, and the defendant had told him to remedy it by asking the plaintiff to go to the place of overflowing flood water 'to have a look' at it. I am satisfied, all on balance of probabilities, that by saying so to the plaintiff, the defendant meant that the plaintiff should increase the height of the bund, and this is fortified by the defendant seeing the plaintiff take a 10-ton tractor to do the work on a bund with overflowing water, at a place in darkness save relieved somewhat by the lights of the plaintiff's tractor. Defendant never took any step to stop the plaintiff from taking a tractor to go there, he had every opportunity to do so if he wanted, while in fact, he wanted the plaintiff to do the work in question with a tractor, such work being work not done usually at night. Plaintiff wanted to save the mine from being flooded and being closed consequently for a about one week if it was flooded. Loss of profit was regarded by him as more serious than danger to life.

In the circumstances, I think with reference to some of the particulars of negligence alleged by the plaintiff in that statement of claim, that the defendant on that night had indeed failed to take any precaution (a) for safety of the plaintiff; (b) for not exposing the plaintiff to risk of injury of which the defendant knew or ought to know; and (c) such precaution consisting of not instructing the plaintiff to increase the height of the bund when he knew or ought to know of any probable landslide.

Facts in this case could quite naturally constitute the situation that gives rise to a special relationship between the plaintiff and the defendant. The defendant, being under the control of the plaintiff, the mine manager, had to be on duty at the mine that night in a position that it was foreseeable that the plaintiff might be injured that night.

I further hold more specifically that the defendant had failed to take the said precaution in the following ways: (a) by failing to ask the plaintiff to stop work and (b) by failing to tell the plaintiff not to drive a tractor there to raise the height of

the bund over which flood water flowed, in view of the conditions of great danger there prevailing that night as set out above. Such specified precaution 'was a thing which was so obviously wanted that it would be a folly' for the defendant to neglect to provide such precaution. I find the defendant liable.

[12] I agree with the learned judge regarding the law. I also agree with the learned judge that there was special relationship between the appellant and the respondent and that there was a duty of care on the part of the appellant towards the respondent. However, with respect, I am unable to agree with him on his finding of negligence on the part of the appellant.

[13] The learned judge appears to have placed a lot of emphasis on the fact that the appellant had failed to stop the respondent from driving the tractor to raise the height of the bund and for failing to tell the respondent to stop work.

[14] I accept that the condition under which the work was being done at that time was quite dangerous, more dangerous than on normal days. But we must also remember that even under normal circumstances, some works are more dangerous than others. At times, the same work can be more dangerous than under normal circumstances. Does it mean that the same type of work should not be allowed to be done when it is more dangerous than under normal circumstances? I think the answer may be 'yes' or 'no' depending on the nature of work and the particular circumstances at that particular time.

[15] The question is: would a reasonable man, considering the nature of work of the respondent which includes raising the bund and taking measures to save the mine from flooding, think that to do the work at the time of the accident under the conditions then prevailing was so dangerous that to allow the respondent to do it or not to stop him from doing it, constitutes negligence?

[16] We must bear in mind that in this case, the respondent himself took out a tractor under similar conditions and at the same time and was doing the same type of work himself. It goes to show that to do the work under such conditions was not so inherently dangerous that he himself would not do but asked the respondent to do. The respondent himself did not object to it. Nor did he stop work because he thought it was too dangerous. He had, prior to the date, worked in the mine for 16 years. He was an experienced worker. He himself would have known if it was too dangerous to do the work then. With greatest respect to the learned judge, I am of the view that he had not paid sufficient attention to the factors mentioned above. Had he done so, he might have come to a different conclusion. In any event, I am of the view that, on the facts on this case, it would not be reasonable to find negligence on the part of the appellant for allowing or for not stopping the respondent from doing the work he was doing at the time of the accident.

[17] On damages, two issues were raised, the first concerning an award for medical expenses at a private hospital and the second, on loss of earning capacity.

[18] Regarding the award for medical expenses both parties agreed that the amount of RM15,028 was incurred as medical expenses by the respondent. The learned judge awarded that amount as special damages. Before us, it

was argued that the full amount should not have been awarded because part of it was medical expenses incurred at a private hospital. Learned counsel for the appellant submitted that the learned judge had failed to consider whether, in the circumstances of the case, it was reasonable for the respondent to seek medical treatment at a private hospital. Instead, the learned judge had imported his personal knowledge of the hospital and concluded that the amount claimed was reasonable.

[19] On this point, this is what the learned judge said (at p 775):

> The other ground for disputing liability is that of the medical expenses was incurred in Fatima Hospital instead of the Ipoh General Hospital. Fatima Hospital is a private hospital run by a Christian mission and I have every reason to believe from my six years as a resident judge in Ipoh before, it has never aimed to make profit for the sake of making profit and though it is a private hospital; but it is closer to being a charitable institution. Fatima Hospital is a poor man's second choice of hospital in Ipoh being unlike one of those expensive private hospitals. I do not think therefore I need even further to delve into question of reasonableness of his getting treatment at a private hospital.

[20] It was complained that the learned judge had imported his personal experience of his long stay in Ipoh to make the conclusion that he did regarding Fatima Hospital.

[21] I shall now discuss the so-called two lines of authorities or two schools of thought regarding the right to get treatment at a private hospital and to be paid the full amount for it as special damages. I shall first deal with cases in which the full expenses at private hospitals were allowed.

[22] *Yaakub Foong v Lai Mun Keong & Ors* [1986] 2 MLJ 317, was a High Court, Johor Bahru case. The plaintiff was first admitted to the General Hospital at Johor Bahru. Later he was transferred to Singapore General Hospital. The learned defence counsel submitted that the plaintiff should get himself treated at the Government Hospital in Johor Bahru because it is cheaper by half. Shankar J (as he then was) held (at p 317):

> As to this view, it is my view that a claimant is entitled to have himself treated in a private hospital if in all the circumstances that is not an unreasonable thing for him to do.

[23] The learned judge allowed the claim. Unfortunately, the learned judge did not state the facts on which he found the circumstances reasonable in that case.

[24] In *Tajuddin bin Sheikh Daud v Wong Kin Yin* [1989] 2 CLJ 237, the plaintiff was transferred from the General Hospital to Fatima Hospital against medical advice. The claim for the expenses incurred at the Fatima Hospital was allowed. Based on the evidence adduced before him, Peh Swee Chin J (as he then was) found that:

> Because of the grossly inadequate attention and rather inadequate treatment, coupled with a great deal of apprehension as to the possible computation of his right leg which Dr Mathews had told him in General Hospital, the plaintiff was simply quite entitled to try to seek great recovery from his injuries and reduce his residual disabilities by discharging himself from General Hospital and admitting himself to Hospital Fatima.

[25] According to Chin Fook Yen JC (as he then was) in *Peraganathan a/l Karpaya v Chong Yuk Sang & Anor* [1995] MLJU 246, [1996] 1 CLJ 622, an appeal against this judgment of Peh Swee Chin J was dismissed. It must have been by the Supreme Court. Unfortunately, we do not have the benefit of a written judgment of the appellate court and, therefore, we do not know the grounds for the decision.

[26] In *Chong Kam Seng v Herman bin Baharuddin* [1995] 2 CLJ 413, the plaintiff who met with an accident in Johor Bahru sought treatment at a private hospital in Singapore. Counsel for the defendant argued that the plaintiff was not entitled to compensation for hospital expenses as claimed as he acted unreasonably in discharging himself from a government hospital and not giving the medical personnel at the government hospital in Johor Bahru a chance to treat him.

[27] On the question whether a plaintiff was entitled to medical treatment in a private hospital, James Foong J said (at p 414):

> I am of the view that the yardstick to determine whether a claimant is entitled to medical expenses expended by him in a private hospital of his choice rather than seeking treatment from a government hospital where it is practically free, is not on whether the government hospital at that material time could or could not provide adequate care and attention to him.

[28] The learned judge held that the plaintiff was entitled to seek medical treatment at a private hospital. The learned judge also held that because of the proximity and linkage to Singapore it was not unreasonable for a person who suffers injuries as a result of a road accident in the state of Johore to seek medical treatment in Singapore.

[29] *Chin Lin Soon lwn Mad Daud bin Mat Zain dan satu lagi* [1996] MLJU 346 is another case involving an accident in Johore and the plaintiff sought medical treatment in Singapore. Haidar J (as he then was) held:

> Mengenai kos perubatan di Singapura pula, saya berpendapat bahawa SP1 berhak mendapat rawatan yang sebaik-baiknya bagi kecederaan yang dialami oleh beliau dan memandangkan bahawa Singapura adalah berdekatan dengan Johor, saya berpendapat kos perubatannya di Singapura boleh dituntut oleh SPl.

[30] In short, he was of the same view of James Foong J in *Chong Kam Siong*.

[31] *Lim Wee Heong dan satu lagi Iwn Nai Wah Hing dan satu lagi* [1996] MLJU 394 is another Johor case. The plaintiff was rushed to a government hospital but two days later, at his request, transferred to a private hospital for treatment. Mohd Ghazali H (as he then was), inter alia, held:

> Saya tidak dapat menerima desakan peguam pihak defendan bahawa perbelanjaan perubatan hospital swasta yang dituntut seharusnya dikurangkan sebanyak satu pertiga. Plaintif kedua telah meninggalkan hospital awam tersebut dan membawa bersamanya plaintif pertama apabila ia berpendapat rawatan yang ia terima daripada hospital awam itu tidak sempurna dan tidak memuaskan baginya; ia telah menjelaskan ia khuatir kakinya akan dikerat dan berpendapat ada kemungkinan kakinya dapat diselamatkan dengan rawatan yang lebih rapi di hospital lain. Dalam keadaan demikian, saya berpendapat adalah munasabah baginya membawa anaknya sekali

untuk menerima rawatan bersamanya di hospital lain. Saya berpendapat apa yang telah dinyatakan di dalam kes *Tan Sia Bak v Mooi Kim Ming & Anor* merupakan dikta sahaja dan soalan sama ada ianya terpakai hendaklah tertakluk kepada fakta yang terdapat di dalam sesuatu kes dan tidak seharusnya dipakai secara am. Memandangkan demikian, saya membenarkan tuntutan plaintif pertama bagi perbelanjaan perubatan hospital swasta tersebut tanpa apa-apa pengurangan.

[32] It should be noted that the learned judge did not say that he considered it an absolute right of a person to seek medical treatment at a private hospital and get compensated in full for it. Instead, he considered the reasons why the plaintiff got himself discharged from the government hospital and went to the private hospital and he found the reasons to be reasonable.

[33] *Romuloo a/l Appalasamy & Anor v Tan Seng Kee & Anor* [2000] 5 MLJ 655 is another High Court of Johor Bahru case. In that case, after the accident, the respondent (plaintiff in the sessions court) was admitted to the Sultanah Aminah Hospital and was treated for 32 days. The respondent then sought treatment at Mount Elizabeth Hospital in Singapore for 67 days. On the question whether the medical expenses incurred at the private hospital in Singapore, Sulong Matjeraie JC (as he then was), confirming the judgment of the sessions court judge, allowed it in full.

[34] The learned judicial commissioner considered the following factors in coming to the conclusion that he did:

(1) Although the respondent had spent 32 days in Johor Specialist Hospital his condition was still critical;

(2) Although there was a gazetted Nephrologist at the General Hospital Johor, the respondent was not sent there as the General Hospital did not have the machines;

(3) The Johor Specialist Hospital could not treat patient with renal wound;

(4) The respondent did not stay at Mount Elizabeth Hospital for any longer period than necessary

[35] The learned judicial commissioner concluded (at pp 676–677):

Applying the authorities herein before provided by the judgments of the learned James Foong J in *Chin Lin Soon v Mad Daud bin Mat Zain & Anor* [1996] MLJU 346 as decided by Haidar J (as he was then), which with respect this court prefer to follow, the respondent should be given the opportunity to get the best medical treatment available. This is his basic right and because of the proximity of Singapore to Johor it is therefore not unreasonable for the respondent to go to Mount Elizabeth Singapore to seek treatment. He has produced the necessary invoices for the expenses incurred, which again are also not unreasonable and as such should be fully paid by the appellant.

Even applying solely the principle of reasonableness on the claim of medical expenses incurred in private hospital, this court is of the view that as the Johor Specialist Hospital cannot treat patient with renal wound and although the General Hospital may have a gazetted Nephrologist but as it did not have the necessary machine, it is only reasonable for the respondent to go to Mount Elizabeth Hospital Singapore, where they have the necessary expertise and facilities. Further, the fact

that the respondent was unconscious for more than 30 days at the Johor Specialist Hospital and for the other reasons outlined above it is only reasonable that he be allowed to go to Mount Elizabeth Hospital, Singapore.

[36] As can be seen, while the learned judicial commissioner said that he preferred the view expressed by James Foong J in *Chong Kam Seng* and Haidar J (as he then was) in *Chin Lim Soon*, the learned judicial commissioner also applied 'the principle of reasonableness' and, on the facts, found that it was reasonable, under the circumstances for the respondent (in that case) to seek treatment at the private hospital in Singapore and he also found, as a fact, that the expenses incurred was reasonable.

[37] In *Suriyati bte Takril v Mohan a/l Govindasamy & Anor* [2001] 2 MLJ 275, another Johor Bahru High Court case, Abdul Malik Ishak J had occasion to consider the issue again. In that case, the sessions court, inter alia, awarded the appellant RM3,000 for the appellant's cost of a knee replacement surgery at a government hospital although the appellant requested for the surgery at a private hospital. The learned judge relied on *Yaakub Foong* and *Chong Kam Siong* and held that 'a victim of a road accident need only show a semblence of reasonableness to be entitled to seek medical treatment at a private hospital'. The learned judge also found the RM11,000 as recommended by two private specialists for the costs of the appellant's knee replacement surgery at a private hospital was reasonable. From the judgment it appears that the only reason why the appellant wanted the surgery to be done in a private hospital was because 'it could be done fast.'

[38] It is to be noted that even amongst cases where the full amounts for medical expenses at private hospitals were allowed, there exists two approaches. The first is that a person has an absolute right to seek medical treatment at a private hospital and get compensated in full for it. He does not have to prove that the reasons for his seeking medical treatment at a private hospital is reasonable, or that the expenses incurred is reasonable. This is the approach taken by James Foong J in *Chong Kam Seng* and Haidar J in *Chin Lin Soon*.

[39] On the other hand, the other approach is that plaintiff is entitled to be compensated in full for medical expenses in a private hospital if it is reasonable. The question then is: what is it that should be reasonable? Is it the reasons for seeking medical treatment at a private hospital or the amount charged by the private hospital and claimed by the plaintiff or both? In *Yaakub Foong*, Shankar J appears to have considered the reasons for getting treatment at a private hospital. In *Tajuddin bin Shaik Daud*, Peh Swee Chin J very clearly considered the reaosns for getting treatment at a' private hospital, in particular 'the grossly inadequate attention and rather inadequate treatment coupled with a great deal of apprehension as to the possible amputation of his right leg'.

[40] Similarly, in *Lim Wee Heong* and in *Romuloo a/l Appalasamy & Anor*, Mohd Ghazali J and Sulong Matjeraie JC respectively, also considered the reasons for seeking medical treatment at a private hospital. From these cases it appears that once the court is satisfied that the reasons for seeking medical treatment at a private hospital is reasonable, then the amount charged by the hospital and claimed by the plaintiff should be allowed in full. However,

Sulong Matjeraie JC did mention that based on the invoices produces, he was also satisfied that the expenses incurred was also reasonable. The courts do not appear to consider whether even if the reasons for seeking medical treatment at a private hospital is reasonable, the amount charged and claimed is reasonable, taking into consideration the 'normal' charges for similar treatment in other private hospitals.

[41] I shall now consider 'the other line of cases,' ie where the claim is not allowed at all or where only part of the claim is allowed. In *Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor* [1988] 1 MLJ 19 (SC), the trial judge had, inter alia, awarded RM80,000 as general damages and RM46,152 as cost of plastic surgery and RM10,500 as cost of psychiatric therapy at a private clinic. On appeal, the Supreme Court disallowed both the awards in respect of plastic surgery and psychiatric therapy as the treatment was available in any government hospital and they should be regarded as absorbed in the award for general damages.

[42] In *Mooi Kim Ming & Anor v Tang Sia Bak* [1988] 2 CLJ 797 (HC), the second plaintiff had discharged himself from the government hospital against medical advice and had admitted himself into a private hospital on the same day. Anuar J (as he then was) held that the second plaintiff's action of discharging himself from a government hospital and readmitting himself into a private hospital could not be regarded as unreasonable. The reason given by the learned judge was that the plaintiff 'did so apparently to get better treatment at Hospital Fatimah.' He therefore allowed the claim for the medical expenses incurred by him for the treatment at Fatimah Hospital, the same hospital in issue in the instant appeal.

[43] But, Abdul Malek Ahmad J (as he then was) in *Harcharan Singh a/l Saudagar Singh v Hassan bin Ariffin* [1990] 2 CLJ 393 (HC), pointed out that the case under discussion went up to the Supreme Court under the name of *Tang Sia Bak v Mooi Kin Meng & Anor*, Supreme Court Civil Appeal No 249 of 1987. According to Abdul Malek Ahmad J, the Supreme Court held that 'where a plaintiff transfers himself from the general hospital to a private hospital on his own, he should only be entitled to one-third of the amount claimed'. Unfortunately, we did not have the advantage of reading the judgment of the Supreme Court.

[44] In *Harcharan Singh a/l Saudagar Singh v Hassan bin Ariffin* [1990] 2 CLJ 393 after the accident, the plaintiff was immediately rushed to Teluk Intan District Hospital and then taken by ambulance to the Ipoh General Hospital. There he was told that his leg might have to be amputated. His family immediately transferred him to a private hospital. The private hospital is Fatima Hospital, the same hospital as in the instant case.

[45] Abdul Malek Ahmad J (as he then was) held that, as for medical expenses, since the plaintiff had transferred himself from the General Hospital to a private hospital on his own accord, the award must be reduced. How much was it reduced to? The headnote says that only two-thirds of the amount claimed was allowed. The judgment on that point, with respect, is quite difficult to follow even though my understanding is that only one-third was allowed,

following *Tang Sia Bak v Mooi Kim Ming & Anor* (Supreme Court Civil Appeal No 249 of 1987.

[46] In a subsequent case of *Peraganathan a/l Karpaya v Choong Yuk Seng & Anor* [1995] MLJU 246, Chin Fook Yen JC cited *Harcharan Singh a/l Saudagar Singh*'s case as awarded one-third of the amount claimed only. I take it that Abdul Malek Ahmad J had awarded one-third of the amount claimed in *Harcharan Singh a/l Saudagar Singh*'s case.

[47] The next case is *Peraganathan a/l Karpaya*. In this case, the plaintiff who was unconscious was brought to Teluk Intan District Hospital after the accident. His father arranged for a transfer to Fatima Hospital (again the same hospital in question) after being informed that the Plaintiff s leg was to be amputated and his request to transfer to Ipoh General Hospital was turned down. Chin Fook Yen JC held:

> It is my opinion that when the Court is called upon to determine whether or not the expenses incurred in a private hospital should be allowed in such cases, it should not rely on medical advice solely as such, but whether in this particular circumstances of the case, the hospital concerned is ready and able to provide adequate facilities, expertise and treatment to the patient. In this connection, Dr Awtar Singh (DW2) testified 'There is nothing in the records to indicate that the (plaintiff's) leg was to be amputated. If such advice was given it would be recorded in the medical records. In normal cases, where the District Hospital cannot handle the case, it will be referred to General Hospital Ipoh, as the latter has a Resident Orthopaedic Surgeon.' In the instant case, it turned out that there was no necessity to have the plaintiff's leg amputated. The plaintiff had not produced any evidence to satisfy the Court that the state of affairs existed in T/I Dt Hospital then to give rise to such apprehension. The case of *Tajuddin* and this case are distinguishable. The claim of RM11,629.90 is therefore reduced to RM4,000 (round figure).

[48] The next case is another Johor Bahru case and that is the case of *Ng Aik Kian & Anor v Siah Loh Sia* [1997] MLJU 143. In that case, the plaintiff was admitted to the Hospital Sultanah Aminah for less than an hour and initial treatment was provided by the nurse. No evidence was adduced to show that Hospital Sultanah Aminah had no facilities like that of a private hospital. Abdul Malik Ishak J held:

> It would be most unfair for this Court to speculate whether the treatment accorded by Hospital Sultanah Aminah was inadequate as there was no evidence adduced in that direction.

[49] Following *Peraganathan a/l Karpaya*, the learned judge awarded one-third of the amount claimed. However, we have seen that in a subsequent case, *Suriyati bte Takril v Mohan a/l Govindasamy & Anor*, the learned judge appears to have changed his mind on the issue.

[50] In *Chong Chee Khong & Anor v Ng Yeow Hin* [1997] 5 MLJ 786, learned counsel for the defendant submitted that the court should allow only one-third of the amount claimed for medical expenses at a private hospital. The learned counsel relied on *Peraganathan a/l Karpaya*. Kamalanathan Ratnam JC (as he then was) had this to say (at pp 795–796):

> On principle, I accept and endorse the view expressed by my learned brother, Chin Fook Yen JC I decline to follow the decision in *Chong Kam Siong v Herman bin*

Baharuddin 6 Mallal's Digest (4th Ed, 1997 Reissue) para 1262 relied on by the plaintiff, where according to the editor's note, the learned Judge is reported to have allowed a claim of RM43,070 which was equivalent to the sum spent by the plaintiff who discharged himself form a Government hospital in Johor Bahru and had himself admitted to a Singapore hospital. His Lordship is reported to have held that the hospital in Singapore should be treated like other private hospitals in Malaysia and thereby allowing for the full medical expenses.

The District Government hospitals of today are equipped with sufficient manpower and equipment to treat victims of accidents. However, if further expertise or sophisticated equipment are required in a particular case, the victim is invariably sent by ambulance to the main referral centre in the State. Therefore it cannot be gainsaid that treatment from Government hospitals is second to none. Needless to say that paying patients of private hospitals are accorded personal facilities and accommodation in conformity with their paying status. What should be considered by the Court is the treatment accorded, not the accommodation provided.

In any event, in the case before me, the reason the first plaintiff went to the Tawakal Hospital where he expended a sum of RM15,429 was because the University Hospital did not attend to an injury to his right leg. Yet, he did not provide any report or letter from Tawakal Hospital to show that such was indeed the case. A mere assertion without documentary evidence must result in this Court rejecting this claim totally.

[51] The claim for medical expenses at the private hospital was dismissed.

[52] In *Hj Ariffin Hj Ismail v Mohamad Noor Mohamad* [2001] 2 CLJ 609, this court dismissed the claim for medical treatment in London on a number of grounds including that the treatment could have been done in Malaysia.

[53] We see that in this line of cases, there is one judgment of the Supreme Court (*Pengarah Institut Penyelidikan Perubatan & Anor*) which did not allow medical expenses at a private hospital (Fatima Hospital) because the treatment was available at a government hospital. There is another judgment of the Supreme Court (*Tan Kia Bak*) that allowed only one third the amount claimed because the plaintiff transferred himself to a private hospital (also Fatima Hospital) on his own accord. There is also a judgment of this Court (*Hj Ariffin Hj Ismail*) which dismissed the claim for medical expenses in London, on the ground, inter alia, that the treatment could have been done in Malaysia. High Court Judges have also been following *Tan Kia Bak* and awarded one-third. However, where only a mere assertion of the expense incurred was made without documentary evidence, Kamalanathan Ratnam JC rejected the claim totally (*Chong Chee Khong*).

[54] It is interesting to note that both the cases that had gone up to the Supreme Court (*Tajuddin bin Shaik Daud*) and *Tang Sia Bak* involve Fatima Hospital, the hospital in question in the instant appeal. In the former case, the full amount was awarded. In the latter case only one-third was awarded. But, on principle, the two cases seem to me to be reconcilable. True that in *Tajuddin bin Shaik Daud*, the plaintiff transferred himself to Fatima Hospital against medical advice from the General Hospital, but the learned High Court judge (whose judgment was confirmed by the Supreme Court but we do not have the written judgment of the Supreme Court) found as a fact that under the circumstances the plaintiff was 'simply quite entitled' to get himself admitted

to Fatima Hospital. In *Tang Sia Bak*, the reason for the transfer is not known and the Supreme Court awarded one-third. So, there is really no conflict in principle as far as the two judgments of the Supreme Court are concerned. Even the other Supreme Court judgment in *Pengarah Institut Penyelidikan Perubatan* is also reconcilable: if the treatment is available at the government hospital, then the plaintiff is not entitled to seek medical treatment at a private hospital.

[55] All the other cases from both lines, except for two High Court judgments, seem to follow the same principle, ie a plaintiff is not entitled to seek medical treatment at a private hospital if the treatment is available at the government hospital or if the treatment is not inadequate. Such allegation must be proved in every case.

[56] I have mentioned earlier that there are two High Court decisions that say that a claimant is entitled to medical expenses expended by him in a private hospital of his choice as a matter of right. The cases are *Chong Kam Seng* and *Chin Lin Soon*. From the earlier discussion of the authorities, in particular, in view of the three decisions of the Supreme Court, ie *Institut Penyelidikan Perubatan & Anor*, *Tang Sia Bak* and even *Tajuddin bin Shaik Daud* and the judgment of this Court in *Hj Ariffin Hj Ismail*, not to mention the judgments of the High Court, that view clearly cannot stand.

[57] In my view, if a person is spending his own money, he has every right to seek medical treatment wherever he wishes. But when he is claiming from somebody else in the form of damages, it is a different matter. The question of reasonableness cannot be separated from the issue of quantum of damages. It is a matter of principle that the quantum of damages awarded must be reasonable.

[58] I also do not think that 'the semblence of reasonableness' test advocated by Abdul Malik Ishak J in *Suriyati bte Takril*, being the only case that talks about such test, as far as I can ascertain, can stand.

[59] To summarize my view on the issue, every person has a right to seek medical treatment at a hospital of his choice be it at a government hospital or at a private hospital. But, when it comes to awarding damages for such treatment, if the treatment is sought at a government hospital, the full amount expended and paid by the person should be awarded. But, if he seeks treatment at a private hospital, he has to prove, first that he is justified to seek treatment at a private hospital and, secondly, the amount incurred is reasonable. Regarding the first hurdle that he has to cross:

(a) He must prove that that particular treatment is not available at the government hospital either due to the unavailability of the necessary equipment or qualified doctors or other sufficient reasons; or

(b) He must prove that though the treatment is available at a general hospital, it is not available within a reasonable period considering the urgency of the treatment. This may be due to the congestion at the government hospital or for other sufficient reasons; or

(c) He must prove that that the treatment at the government hospital though available, is grossly inadequate. This may be due to lack of trained doctors in that particular field or for some other good reasons. As pointed out by Kamalanathan Ratnam JC in *Chong Chee Kong* with whom I agree, we are concerned with treatment, not accommodation.

[60] If the court is not satisfied that the plaintiff is justified to seek treatment at a private hospital then, depending on the facts and the circumstances of each case, the court should either dismiss the claim altogether as was done by the Supreme Court in *Pengarah Institut Perubatan & Anor* and by this court in *Hj Ariffin Hj Ismail* or award an amount not exceeding one-third of the expenses as was done by the Supreme Court in *Tang Sia Bak.* It must be noted that the one-third is nowhere fixed by any written law. It is a matter of practice. If it is shown that in a particular case, even one-third is excessive, considering the expenses that otherwise would have been incurred in a government hospital, an amount less than one-third may be awarded.

[61] Now, assuming that the plaintiff has crossed the first hurdle and the court is satisfied that the plaintiff is justified in seeking medical treatment at a private hospital, the plaintiff must prove that the expenses incurred and the amount claimed is reasonable taking into consideration normal charges at other local private hospitals. The court may award what it considers to be a reasonable amount which may even be the full amount claimed.

[62] Even though this case does not concern treatment at a private hospital in Singapore, in view of the number of cases, all at High Court level, particularly from Johor, that involve treatment at private hospitals in Singapore, something has to be said about it. The courts in Johor have been treating the treatment in private hospitals in Singapore as equivalent to treatment in local private hospitals for one reason only: proximity between Johor and Singapore. In my view, that is overlooking other relevant factors. No one can deny that the cost of living in Singapore is higher, salaries are higher, rentals are higher than in Malaysia. No one can deny that one Singapore dollar is more than double the value of the Malaysian Ringgit.

[63] So, in the case of treatment at a private hospital in Singapore, it must be proved to the satisfaction of the court as in the case of treatment at a private hospital locally. Then, it must be proved that the treatment is not available at private hospitals locally, or for some sufficient reasons, the treatment at a private hospital locally is inadequate. In other words, it is the same test as that applicable to justify treatment at a private hospital locally, except that the test is applied to local private hospitals instead of a government hospital.

[64] If the court finds that the plaintiff is not justified to seek medical treatment at a private hospital in Singapore, but is justified to seek medical treatment at a private hospital locally, the court should only award an amount similar to that which would be awarded had the plaintiff sought medical treatment at a local private hospital.

[65] But, if the court is satisfied that the plaintiff is justified in obtaining medical treatment in Singapore, then the court should consider the reasonable amount to be awarded which may be the full amount claimed or less.

[66] In the instant appeal, even though the learned judge in his grounds of judgment did not refer to the facts leading to the transfer of the respondent from the Ipoh General Hospital to Fatima Hospital but appears to have imported his personal knowledge regarding the expenses charged by Fatima Hospital, there is ample evidence to show that the Respondent was justified in obtaining medical treatment at the Fatima Hospital. The respondent was hospitalised for 73 days at the Ipoh General Hospital where he underwent one major operation to his hand. No operation was done to the plaintiff's leg at the Ipoh General Hospital from the date of admission on 15 October 1982 until the date of his discharge on 26 December 1982. Indeed, only after he was discharged from the Ipoh General Hospital that he on 30 December 1982 (four days after the discharge) was admitted to Fatimah Hospital. There muscle flap and skin graft operation was done to his right leg and he was discharged on 10 February 1983. He was again readmitted to Fatimah Hospital on 25April 1983 and underwent a vasculorized pedicle fibular graft and bone graft operation to bridge the bone gap in the right tibia. He was discharged on 23 July 1983. On 17 December 1984, he was again readmitted at the Fatimah Hospital on 17 December 1984. A third operation was done to remove screws, dead bone and necrotic tissue from the right leg. Garamycin beads were inserted along the infected right tibia. He was discharged on 4 February 1985. Altogether, he was hospitalised at Fatimah Hospital for 183 days.

[67] During his stay at the Ipoh General Hospital of 73 days, no operation was done to his leg. Instead, he was discharged to follow up weekly at the clinic only for wound inspection.

[68] So, there is ample evidence that he was justified in seeking further treatment at the Fatimah Hospital after his discharge from the General Hospital. Regarding the amount, it was agreed by both parties. In the circumstances, had liability been found in the respondent's favour, he should have been awarded the full amount of RM15,028 for medical expenses.

[69] The other point argued was that the learned judge should not have awarded the sum of RM10,000 as damages for loss of earning capacity. The reason forwarded was that five years after the accident the respondent started working and was earning more than before the accident. This is what the learned judge said in his judgment.

> As for claim for loss of earning capacity, it cannot be awarded for taking the place of loss of future earnings where the latter is not justifiable by evidence. However as a mining worker for many years, he did not seem to have done any other type of work, and with the mining industry being on an irretrievably sharp decline, there is a residual risk, I am satisfied, the plaintiff will find himself somewhat handicapped to get work that would give him a good income as a mining worker, what with the weakness of the right leg, stiffness of the right ankle and some slight shortening. I award a sum of $10,000 as damages for loss of earning capacity.

[70] From the respondent's own evidence, he was earning RM512 per month before the accident. After the accident, he stopped working for five years and eight days. He resumed work on 22 October 1987 as a tractor driver with one Chai Yew Kee, getting RM18 per day but later increased to RM20 per day. He worked for about 26 days a month. After that, he worked for Kinta

Amang Company getting a basic salary of RM600 and was paid allowance when working outside. He was getting between RM800 to RM900 a month. On 1 January 1990, he went to work with Peking Tin Mine getting RM30 a day plus RM100 allowance per month and a further RM30 as food allowance. He worked for 26 days a month. Then he went to work with a company called Lad & Tun at Batu Gajah. There he was paid RM700 a month with overtime allowance of RM200 per month. After that, he went back to work with Peking Tin Mine he was paid RM30 per day and food allowance of RM200 per month, also as a tractor driver.

[71] I am of the view that, even if we have dismissed the appeal on liability, we would have allowed the appeal on the issue of loss of earning capacity. This is because the respondent who, at the time of the accident was a tractor driver was able to work and indeed worked as a tractor driver with a number of employers after the accident and was earning more than before the accident. In the circumstances, I do not think that he had suffered any loss of earning capacity. The appeal is allowed with costs here and in the court below. The deposit is refunded to the appellant.

[72] My brother Mohd Noor Ahmad FCJ had read this judgment and had agreed with it. My brother Abdul Aziz Mohamad JCA will prepare a separate judgment.

Abdul Aziz Mohamad JCA:

[73] The respondent was the plaintiff in the High Court and the appellant was the defendant. The High Court found the defendant liable in negligence for injuries suffered by the plaintiff while doing certain work in a tin mine and awarded damages for the plaintiff. The defendant appealed to this court, challenging the decision of the High Court as regards three matters, namely, the finding of liability, the award of RM15,028 for medical expenses, and the award of RM10,000 for loss of earning capacity. We allowed the appeal, finding that there was no liability. We also held that, if there was liability, the award for medical expenses was in order but there should have been no award for loss of earning capacity.

[74] The report of the judgment of the High Court appears as *Lew Thai v Chai Yee Chong* [1997] 5 MLJ 762. As I shall be making references to the judgment, I shall continue to refer to the parties as they are referred to in the judgment, that is, as plaintiff and defendant.

Liabiltiy

[75] At the beginning the plaintiff sued the operator of the tin mine, a company by the name of Chai Kim Kong & Sons Sdn Bhd, as the employer of the plaintiff, and the defendant as the servant or agent of the employer, so that the question that would have arisen on liability would have been essentially the question of the duty of care owed by an employer to his employee and of any breach of it. But subsequently the claim against the employer was discontinued as not maintainable under the Employees' Social Security Act 1969, and the writ and statement of claim were amended so that the action

was maintained only against the defendant, no longer, however, as servant or agent of the employer, but, as the trial judge was at pains to emphasize, as a co-employee of the plaintiff, so that, as regards duty of care, the question that was to arise was the duty of care owed by an employee to another employee and of any breach of it.

[76] The events that led to the injuries that the plaintiff suffered were alleged only in para 3 of the amended statement of claim. I quote the paragraph:

> On the 14 October 1982, the Plaintiff was instructed by the Defendant to build an embankment to prevent the rising water from flooding the mine, and whilst he was building the embankment the mine wall collapsed and as a result of which the Plaintiff was buried and suffered serious injuries and damages.

[77] Essentially the evidence of the plaintiff as to those events, as set out by the trial judge at pp 767C–769A of the report, may be summarized as follows. It had been raining continuously and quite heavily since 2pm on that day. After dinner, the plaintiff, a *kepala,* noticed water rising in the mining pit as a result of water overflowing from the mining pool across the bund which separated the mining pit from the mining pool. He informed the defendant of the situation. The overflow of water from the mining pool into the mining pit could only be checked by increasing the height of the bund at the parts where the water overflowed. It was important to stop the flooding of the mining pit because if it was flooded the mine would have to cease operation for a time. The defendant gave certain instructions which the plaintiff understood to be to increase the height of the bund. The plaintiff drove a tractor to the place and started work on the bund. The work consisted of scooping earth from the area and depositing it on the bund to increase its height. The defendant also went with a tractor to increase the bund at another part. While the plaintiff was reversing his tractor, the bund collapsed and the tractor fell into the mining pit, pinning the plaintiff under it. The cause of the collapse of the bund was not established. I may remark that in the light of the plaintiffs evidence, the reference to embankment in para 3 of the amended statement of claim actually meant the bund, the reference to building an embankment actually meant raising the height of the bund, and the reference to the mine wall collapsing actually meant the collapse of the bund. I may also mention that I have not mentioned the conditions under which the plaintiff was working on the bund, such as the fact that it was at night and the state of the lighting available at that time, which was about 8pm, because the tractor's falling into the mining pit together with the plaintiff was not due to any aspect of the conditions of working but was due to the collapse of the bund, the cause of which, as I said, was not established.

[78] Paragraph 4 of the amended statement of claim alleged that the plaintiffs injuries were caused by the defendant's negligence. It listed particulars of negligence in eleven subparagraphs, of which the trial judge at p 766H of the report, singled out three. Before setting out those particular subparagraphs, it is necessary that I point out that at the outset, at p 766F of the report, the trial judge emphasized, as a remarkable feature of the case, 'that the negligence complained of is basically, not in commission of any act of negligence but in negligent omission to do some act or acts'. To the judge, therefore, the

defendant's negligence lay not in the doing of an act or acts but in failing to do an act or acts. (It will be seen in due course that it was failure to act to save the plaintiff from injury). Whether that was the perception of the trial judge himself or whether that was the case that was advanced by the plaintiff in submission before him, the plaintiff in submission before us did not question that view of the plaintiff's case; and I took it to be the correct view.

[79] Having said that, I now set out the particulars of negligence singled out by the judge, as they are set out in para 4 of the amended statement of claim and according to the original numbering of the subparagraphs:

(a) Failing to take any or any adequate precautions for the safety of the Plaintiff.

(b) Exposing the Plaintiff to a risk of damage or injury of which they knew or ought to have known.

(i) Instructing the Plaintiff in his capacity as manager to build an embankment with the use of a tractor when he knew or ought to have known the impending of a landslip or carving *[sic]* in of the mining wall.

[80] Particulars (b) were originally particulars alleged against he employer when they were a defendant in the action. Note the word 'they'. The act of negligence alleged was that of exposing the plaintiff to a risk of injury. It would be an act of commission and not an act of omission. As the correct view taken of the plaintiff's case was that it was a case of the defendant failing to do something, particulars bought not to have been singled out by the judge. Particulars (i) were particulars that were originally directed against the defendant when he was sued as a servant or agent of the employer. Thus, the mention of his capacity as manager. That was the only place in the amended statement of claim in an action for negligence between employees where the defendant's capacity as manager was mentioned. The allegation was that of instructing the plaintiff to build an embankment. Being an allegation of commission, the particulars ought also not to have been singled out by the judge. In any case, as regards particulars (b) and (i), there was no evidence that the defendant knew or ought to have known of the danger of the bund collapsing. The fact that he himself went to work on the bund negated such knowledge. The only particulars of the three singled out by the judge that would be consistent with the view that the plaintiffs case was one of negligence of omission was particulars (a), namely, failing to take precautions for the safety of the plaintiff.

[81] After examining the evidence on both sides, the trial judge proceeded (p 772E–F) to examine the law and purportedly to apply it to the evidence with a view to seeing whether a case had been proved by the plaintiff against the defendant as alleged in the amendment statement of claim. The outcome can be seen in the lengthy passage set out by my learned brother Abdul Hamid Mohamad FCJ, which in the report appears at pp 772F–774H, but with the omission of the paragraph at p 772 H–I. I shall be referring to the paragraphs in the passage as it is so set out. Consistently with the perception that the plaintiff's claim was one of negligence of omission, in the first five paragraphs of the passage the trial judge purported to set out the law concerning the one exception where the law of negligence, which otherwise imposes on one a duty

to take care not to cause injury or damage to one's neighbour, does impose a 'duty of care to save the neighbour from such injury or damage for which one is not responsible'. I suppose that by 'injury or damage for which one is not responsible' the judge meant an injury or damage *for the cause of which* one is not responsible. The purpose of the judge must surely have been to see whether the defendant fell within that one exception, so that he had a duty of care to save the plaintiff from the injury that the plaintiff suffered, although he was not responsible for the cause of it. So by negligent omission in this case the judge meant breach of a duty of care to save the plaintiff from the injury. According to the judge, the one exception where the duty of care exists in law is 'when there is a special relationship between the parties'. One would therefore expect to see that in law, in view of that special relationship, such a duty of care arises, that is to say, that the duty of care to save from injury emanates from the nature of the special relationship. One would expect to find the judge stating that the relationship between co-employees is a special relationship and in view of the nature of the special relationship one employee has a duty of care to save the other from injury. I was therefore startled to find in the fourth and fifth paragraphs of the passage the judge saying instead and contrarily, not that something arises from the special relationship, but that something gives rise to the special relationship, the thing being a situation having some element of danger.

[82] It is not apparent from the judgment whether the judge obtained the term 'special relationship' from the authorities or whether it came from his own mind, but in *Clerk & Lindsell on Torts* (17th Ed) at p 243, there is a passage with the heading *Special relationships*. I quote the first part of it:

> It is sometimes suggested that a duty of care may be qualified where there is some special relationship between the two parties, for example as between parent and child, participants in a sport activity, instructor and learner driver. But the relationship should be one of the circumstances to be taken into account in deciding whether reasonable care has been exercised and not a reason for denying or qualifying the duty itself. Thus, whilst the standard required of a parent in the care of her child has to take account of 'the rough-and- tumble of home life', that is no reason for a duty to be denied. Similarly, whilst the standard required of a sportsman has to take account of the competitive nature of the sport, it would be misleading to regard the duty owed as being any less than a duty of care.

[83] It is a passage that attempts to debunk the suggestion that because of some special relationship between two parties no duty of care is owed by one to the other or the duty of care is mitigated. It is not a passage that speaks of special relationship as creating a duty of care to save another from injury where no such duty exists but for the special relationship.

[84] In the fourth paragraph of the passage, the trial judge cited, as an example, a situation giving rise to a special relationship, that is, where 'the defendant is responsible for placing the plaintiff in a position in which it is foreseeable that the plaintiff may be injured.' Such a situation may be found in the same book at pp 246 and 247 in a paragraph dealing with protective relationships (not special relationships). I quote the paragraph, omitting parts that I do not consider necessary for the purpose in hand:

> Protective relationships. There are a number of relationships which give rise to an affirmative duty to take steps to protect the plaintiff from harm. An employer owes such a duty to his employees as does a carrier to a passenger, a parent or school to a child, a custodial authority to a detainee and, to a more limited extent, an occupier to a visitor ... A duty to act affirmatively to protect the plaintiff will also arise where the defendant is responsible for placing the plaintiff in a position in which it is foreseeable that he may be injured. Thus, a roadside ice cream vendor has been held liable for failing to warn a child customer of an oncoming car, a motorist has been held liable for failing to give a similar warning to his passenger who was changing the car wheel, and those who provide alcohol to intoxicated drinkers may be liable for injuries resulting from their drunken state ...

[85] It is about 'an affirmative duty to take steps to protect the plaintiff from harm', that is to say, it is about the one exception that was mentioned by the judge. It will be noticed that the relationships specifically mentioned in the paragraph are termed 'protective relationships', those in which the law treats one person as being under the protection of another. The case of *Ellis v Home Office* [1953] 2 All ER 149 that the judge mentioned in the fifth paragraph of the passage falls under the category of protective relationship between a custodial authority and a detainee. The relationship between co-employees cannot possibly be seen as a protective relationship. It is also to be observed that the example cited by the judge, although in that paragraph in the book is placed under the subject of protective relationships, is actually an example of a duty to act affirmatively, not arising out of a specific protective relationship, but arising out of a situation, and certainly it was wrong of the judge to state that out of such a situation a special relationship arises.

[86] The trial judge did not make a finding, on the basis of the example, that because the defendant in this case was responsible for placing the plaintiff in a position in which it was foreseeable that he might be injured, the defendant had a duty of care to act affirmatively to protect the plaintiff. If he had made such a finding, he would have erred. In the first place, as I said, there was no proof that the occurrence that caused the injury to the plaintiff, namely the collapse of the bund, was foreseeable. So it was not a case of the defendant being responsible for placing the plaintiff in a position in which it was foreseeable that he might be injured. But, more importantly, even if it was such a case, there was no evidence of an occurrence that would give rise to a duty on the defendant's part to act affirmatively to protect the plaintiff. Let me explain what I mean by reference to the example in the paragraph from the book of the passenger changing the car wheel. The footnote says that it is the case of *Hehir v Harvey* [1949] SASR 77. The facts, according to the headnote, were as follows:

> A motor car was travelling along a country road at night when a tyre on a front wheel was punctured and collapsed. The car was travelling on the wrong side of the roadway, and was pulled up without veering to the correct side. The driver, assisted by a passenger, began to change the front wheel. The passenger stood in front of the car operating a jack. He had his back turned to oncoming traffic, and was standing in front of one of the headlights of the car, so as to obscure the beam from that headlight. An oncoming car, approaching on its correct side of the road, collided with the stationary car, and the passenger was crushed between the front bumper bars of the two vehicles. The passenger sued the drivers of both vehicles for damages in respect of the injuries received by him.

[87] The driver of the stationary car was Harvey, and the passenger was Hehir the plaintiff. At p 87, Ligertwood J said: 'There was, I think, an implied request by Harvey that the plaintiff should assist, evidenced by the fact that Harvey stood by, while the plaintiff performed the most arduous part of the operation.' Harvey could therefore be treated as placing the plaintiff hi the position in which he was a position in which there was, in the words of Mayo J at p 83, 'potential risk' — before the approach of the other car, which Mayo J at the same page described as 'the advent of some instrumentality fraught with actual danger'. So there was a situation in which the defendant Harvey was responsible for placing the plaintiff in a position in which it was foreseeable that the plaintiff might be injured, and the plaintiff did get injured, but Harvey's negligence was held to lie, not in his placing of the plaintiff in a potentially risky position, but in his failure to alert the plaintiff to the approach of the other car, 'the advent of the instrumentality fraught with actual danger', so that the plaintiff could stand aside to enable the beam of the stationary car to be seen by the driver of the approaching car.

[88] The point to note is that, as it seems to me, when it comes to a duty of care to act affirmatively to protect someone from injury because one has placed him in a position in which it is foreseeable that he may be injured, it is not sufficient to prove that the plaintiff was placed in such a position and that the injury that was foreseeable occurred. That would be arguing for a duty of care not to do something to cause injury. For there to be a duty of care to act affirmatively to protect, there must be something occurring after the plaintiff has been placed in such a foreseeably risky position that brings on the obligation on the defendant's part to act affirmatively to protect the plaintiff. In this case, there was no such occurrence. From the time that the defendant asked the plaintiff to raise the height of the bund to the time that the bund collapsed, there was no evidence, for example, that the defendant received some indication that the bund was likely to collapse, so that it may be said that he was obliged to act affirmatively and go and tell the plaintiff to stop work and leave the bund.

[89] In the fourth paragraph of the passage, the trial judge cited *Johnson v Rea Ltd* [1962] 1 QB 373 as another example of a duty to protect, that is, 'where the plaintiff [*sic,* probably defendant] creates a danger, even though innocently, he has failed to take steps to remedy or prevent it'. But that example cannot be applied in this case because in this case the defendant did not create any danger. He did not cause the collapse of the bund. In the fifth paragraph of the passage, the trial judge referred to *Carmarthenshire County Council v Lewis CC* [1955] AC 549, where the question was, according to Lord Goddard (p 560), 'whether there is a duty on the occupiers of premises adjoining a highway to prevent young children from escaping on to the highway so as to endanger other persons lawfully passing upon it'. The House of Lords held that there was. I was unable to see any principle that could be derived from that case that could be applied in this case so as to place on the defendant in this case the duty of care to save or protect the plaintiff from the injury that he sustained.

[90] Having considered the law to the extent that I have related here, the judge did not anywhere in the passage expressly state a finding that the

defendant owed a duty of care to the plaintiff, defining its nature and stating the basis for holding that there was such a duty of care. But to find, as he did, that the defendant was liable, he must have found that there was a duty of care. As I have attempted to demonstrate, there was nothing in the law that was considered by the trial judge that would warrant a finding, on the facts of this case, as they were claimed by the plaintiffs or as they were found by the judge in the eight and ninths paragraphs of the passage (which in the report are a single paragraph), that the defendant owed a duty of care to the plaintiff. The trial judge therefore erred in finding that there was a duty of care and that the defendant was liable for having breached it. For that reason, I was of the view that the appeal should be allowed.

[91] I have avoided an examination of the sixth paragraph of the passage and the authorities cited in it because it discusses 'the standard of the duty of care imposed by law on a defendant' and I feel that, having concluded that the judge erred in finding the existence of a duty of care, the question of the standard of duty of care does not call for consideration.

[92] The judge, after considering the law, and stating his findings of fact, proceeded, in the tenth and twelfth paragraphs, to state his findings as to the manner in which the defendant had been negligent. Although having decided that the judge erred in finding the existence of a duty of care it is unnecessary for me to consider the findings of negligence, since there being no duty of care there could not be a breach of duty of care and accordingly there could not be a finding of negligence, I nevertheless wish to observe that from those paragraphs it would appear that what was in the judge's mind as being the duty of care that the defendant owed to the plaintiff was the protective duty of care, that I have already considered, to act affirmatively to protect the plaintiff after placing him in a position in which it was foreseeable that he might be injured. I think, to simplify matters, I can safely ignore the somewhat hazy findings in the tenth paragraph because in the twelfth paragraph there were findings made 'more specifically', which I consider to be the crucial findings. From those findings of failure on the defendant's part, the inescapable conclusion would be that the judge considered that the defendant had the duty of care to take precaution by asking the plaintiff to stop work or to not take the tractor and do the work on the bund. But as I have demonstrated, a protective duty of care of the kind mentioned could not arise unless, after the plaintiff had received his instructions or had commenced to work on the bund, a supervening event occurred that gave an indication to the defendant that the bund was likely to collapse, so as to impose a duty on the defendant to tell the plaintiff not to proceed to the bund with the tractor or to stop work. As I said, the claim of the plaintiff as viewed by the judge was a claim of negligence of omission, not commission, a claim that the defendant as co-employee was negligent, not in asking the plaintiff to raise the height of the bund, but in failing to do something to save or protect the plaintiff. If it was not negligent of the defendant to ask the plaintiff to raise the height of the bund, it could not be negligent of him, in the absence of such a supervening event, to fail to ask the plaintiff to stop work or not to proceed to do the work. If there is no negligence in asking for something to be done there can be no negligence in letting it be done and continue to be done.

Medical expenses

[93] As to medical expenses, it was agreed during the trial in the High Court, as evident from p 74 of the appeal record, that RM15,028 was incurred at the Hospital Fatimah, Ipoh, which was a private hospital, and that formal proof of the amount was not necessary. In their respective written submissions in the appeal before us, both parties stated that RM15,028 was the amount incurred by the plaintiff at that hospital.

[94] In submission in the High Court, according to the judge's notes at p 96 of the appeal record, the defendant's counsel said: 'About the hospital expenses, one-third should be deducted for stay at Fatimah Hospital instead of General Hospital'. It is likely, although it is not absolutely clear from the notes, that 'hospital expenses' in that submission referred to the sum of RM15,028. If it did, then the defendant's case was that only two- thirds of that sum, not the full amount, be allowed. The reply of the plaintiffs counsel was to refer to the medical reports in the agreed and supplementary bundles of documents, presumably as justifying treatment at the private hospital as reasonable.

[95] The trial judge allowed the full sum, holding that he did not have to consider the question of reasonableness of the plaintiffs obtaining treatment at the private hospital because to his knowledge it was close to being a non-profit-making charitable institution. By implication, the judge must have thought that the Hospital Fatimah's charges would be about equal to, or less than, the charges at a government hospital. He therefore did not consider the evidence of the medical reports and the implications to be drawn from them, to arrive at a decision whether it was reasonable for the respondent to seek treatment at the private hospital.

[96] In his written submission in the appeal, the defendant submitted that the Hospital Fatimah was 'not akin to a charitable hospital' and — with which I agreed — that the judge ought not to have imported his personal knowledge about the hospital into the case. After citing authorities, he concluded his written submission with these words:

> The test ought to be that of reasonableness. What is reasonable ought to be decided by the trial Judge based on the evidence adduced and the circumstances surrounding the plaintiffs discharge from a government hospital and admission to a private hospital. Clearly, by not adhering to the test of reasonableness and in fact, categorically stating that the test of reasonableness need not be delved into, would, with respect, constitute a serious misdirection in law.

[97] He did not say whether the sum of RM15,028 should be disallowed completely or only as to a part, or how much of it should be allowed.

[98] In oral submission, however, the defendant's counsel at first said that the sum ought not to be allowed at all but later said that he would have no difficulty with an award of one-third (not two-thirds as contended in the High Court) if the court should find that it would be in accord with the authorities. In submitting that the sum ought not to be allowed at all counsel must have had in mind *Chong Chee Khong & Anor v Ng Yeow Hin* [1997] 5 MLJ 786, the only case among the cases cited in the defendant's written

submission where the cost of treatment at a private hospital was not allowed at all. In that case, there was treatment at a government hospital followed by treatment at a private hospital, but it is not clear from the judgment of Kamalanathan Ratnam JC (as he then was) what were the precise circumstances of the change of hospital. The judgment only mentions that the first plaintiff was in the government hospital for six weeks and that he had to go to the private hospital because the government hospital did not attend to an injury to his right leg. The judge rejected entirely the first plaintiff's claim for expenses at the private hospital, despite the concession of the defendant's counsel that one-third should be allowed, because the first plaintiff failed to provide a report or letter from the private hospital to prove that the government hospital had not attended to the injury. In submitting for one-third, the defendant's counsel in the present case must have had in mind the decision of the Supreme Court in *Tang Sia Bak* (about which more will be said later), which in the defendant's written submission is said to establish the principle - applied in a number of cases, including *Peraganathan a/l Karpaya* which was cited by the defendant's counsel in *Chong Chee Khong* in submitting for one-third — that 'one-third of the expenses incurred at a private hospital are allowed in the event the plaintiff is unable to establish the reasonableness of seeking treatment in a private hospital'. Although the written submission did not expressly say so, the defendant must have meant to submit that the plaintiff had failed to establish by evidence the reasonableness of the treatment at the Hospital Fatimah. The evidence of the plaintiff that the written submission referred to as the only evidence about the switch in hospitals was the following:

> I was admitted to General Hospital Ipoh, and after I left General Hospital, I was admitted to Fatimah Hospital for two or three days after my discharge from General Hospital. The treatment was received there until 1986. The total medical expenses came to about RM15,000.

[99] In his written submission, the plaintiff maintained that the medical expenses incurred at the Hospital Fatimah were reasonable and that he should not be faulted for seeking treatment at the private hospital, and he relied on facts relating to the history of his hospitalization and treatment. Those facts, as enumerated in the plaintiffs written submission, were clearly derived from the evidence of the medical reports in the agreed bundles of documents and the supplementary agreed bundle of documents, particularly the report of the General Hospital, Ipoh, dated 9 June 1983 at p 107 of the appeal record and that of the Hospital Fatimah dated 22 May 1986 at p 113 of the appeal record.

[100] I shall set out the facts that may be gleaned from the two reports, but before doing so I wish to point out an incorrectness in submission. In oral submission, the plaintiffs counsel said that it was obvious to the trial judge that the private hospital charges were reasonable and in the plaintiffs written submission it was said that the judge found that the medical expenses at the private hospital were reasonable. That was incorrect because the judge himself said that he did not have to delve into the question of reasonableness.

[101] Now the facts were these:

(i) On 15 October 1982 the plaintiff was admitted to the General Hospital. He had two injuries. One was to his right elbow, where there was fracture

of the head of the radius with dislocation of the elbow joint. The other was to the right leg, which had a lacerated wound of 5cm anteriorly just above the ankle. The wound exposed the tibial bone, which was found to suffer a comminuted fracture.

(ii) As to the right elbow, close reduction of the dislocation of the elbow joint was done. As to the right leg, close reduction was done for the tibia but the wound over the tibia became infected and received treatment as an open wound with eusol dressing, desloughing and antibiotics cover.

(iii) On 26 December 1982, after about two months and a half, the plaintiff was discharged from the General Hospital on crutches. He was to go to the clinic weekly for inspection of the wound.

(iv) But only four days later, on 30 December 1982, he was admitted to the Hospital Fatimah. He was found to have compound infected fracture of the right tibia and fibula with part of the tibial bone missing. The wound in the right leg was cleaned and, later, muscle flap and skin grafting were done.

(v) He was discharged about a month and a half later with his right leg immobilized in plaster of Paris, but he went for follow-up treatment in the Orthopaedic Outpatient Department of the Hospital Fatimah.

(vi) On 25 April 1993, he was readmitted to the Hospital Fatimah. He had a vascularized fibular graft and bone grafting done to bridge the bone gap in his right tibia the following day. His leg was again immobilized in plaster of Paris.

(vii) He was discharged three months later, on 23 July 1983, but went for follow-up treatment in the same department, where he went regularly for dressing of his wound because it had become infected.

(viii) He was readmitted to the Hospital Fatimah on 17 December 1984, almost five months after his last discharge, because the infection in his right leg had persisted. The screws, dead bone and necrotic tissue were removed from the right leg. Garamycin beads were inserted along the infected right tibia. These were then gradually removed. He was discharged about a month and a half later, on 4 February 1985. He had some infection of the incision wound and went regularly for dressing of this wound.

(ix) As at the date of the Hospital Fatimah's report, 23 May 1986, he was still receiving follow-up treatment in the Orthopaedic Outpatient Department of the hospital.

[102] Those facts show that the problem that was attended to at the private hospital was the injury to the plaintiff's right leg, which consisted of the fracture of the tibia and the related accident wound. As to the tibia, the government hospital had treated it by doing 'close reduction'. As to the wound, it had been treated as an open wound with dressing, desloughing and antibiotics cover. He was discharged as having been treated for the injury to the right leg, except that he had to go weekly to the government hospital

for inspection of the wound. But only four days after his discharge from the government hospital, probably even before the date of his first follow-up visit to it, he went to the private hospital. There was no evidence as to what the complaint was that the plaintiff suffered that made him seek treatment, and so soon too, at the private hospital. He did not give the reason in his examination-in-chief and neither was he asked for it in cross-examination. In fact the plaintiff was not cross-examined at all about his seeking treatment at the private hospital. But the fact was that he was instantly admitted to the private hospital, where he stayed for about a month and a half during which the wound was attempted to be cured by muscle flap and skin grafting, which was something that the government hospital had not done. He was discharged with his leg immobilized in plaster of Paris, whereas he had left the government hospital on crutches and there was no mention of his leg being immobilized in plaster of Paris. The wound, however, continued to suffer from infection. In a letter dated 5 April 1984 at p 110 of the appeal record, which was after his second stay and before the third stay, the Hospital Fatimah said: 'If the infection in his right leg becomes uncontrollable, a below knee amputation of his right leg may have to be done'. But by the end of his third stay at the private hospital, when he was treated for the infection of the wound by the removal of screws, dead bone and necrotic tissue and the insertion and subsequent removal of garamycin beads, the wound was apparently cured because what was reported was only some infection of the incision wound, probably the wound caused by surgical incision involved in the treatment at that stage, not the accident wound. The Hospital Fatimah's report, dated 23 May 1986, which was more than one year after the plaintiffs last discharge, made no mention of infection of the wound occurring after the discharge.

[103] As to the tibia, when the plaintiff was first admitted to the private hospital, it was noticed that part of the tibia bone was missing, something which was not mentioned in the government hospital's report and therefore was probably not noticed by the government hospital. Whereas the government hospital had treated the fracture of the tibia by close reduction, the private hospital, during the plaintiffs second stay there, performed bone grafting in order to bridge the bone gap in the right tibia, presumably caused by the missing bone part, which necessitated the right leg to be again immobilized in plaster of Paris.

[104] On the basis of the evidence furnished by the medical reports, I was of the view that the private hospital had given a more thorough treatment to the plaintiffs right leg, and treatment of a better kind than the government hospital had given, that this constituted proof after the event of the reasonableness of the plaintiffs resort to the private hospital, and that therefore in any event *Tang Sia Bak* did not stand in the way of awarding the plaintiff the full expenses incurred at the private hospital. The defendants's counsel did not submit against the plaintiffs reliance in his written submission on the evidence of the medical reports, but I did realize that it might have been argued, for example, that if the plaintiff had made the weekly follow-up visits to the government hospital, and the infection of the wound was seen to be causing a problem, the government hospital would have continued to treat him until the wound

was cured by using the same methods as those that were used by the private hospital or by some other method, and the missing part of the bone would have been detected and bone grafting would also have been done. I realized that by not following up with the government hospital the plaintiff did not give a chance to the government hospital to prove themselves and I was not prepared to say that if the plaintiff had made follow-up visits to the government hospital he would not have been cured as well as he had been by the private hospital. He might have been cured better eventually and in a shorter time. But what would actually have happened would be speculation, because on the other hand the wound might not have been cured and the right leg might have been amputated. In assessing reasonableness in this case, I could only look at what actually happened and treat the question of what might have happened if the plaintiff had made follow-up visits to the government hospital as irrelevant and beyond determination. As I said, I was of the view that the plaintiffs resort to the private hospital was reasonable and I decided that, if the defendant was liable, the plaintiff was entitled to his claim for the full sum of RM15,028.

[105] The subject, however, does not end there. In his oral submission the defendant's counsel, in view of the differing lines of decisions on the question of entitlement to recover medical expenses incurred at a private hospital, said to the effect that a written judgment on the question would be a useful guide to legal practitioners. The various cases on the question are reviewed by my learned brother in his grounds of judgment.

[106] The best and safest guide that I can give is always to bear in mind the basic principle that a plaintiff is entitled to recover all expenses reasonably incurred for medical treatment as a result of his injuries, as he is entitled to recover all other expenses so incurred. So if it is reasonable that a plaintiff seeks or receives treatment, whether from the outset or midway, at a private hospital instead of a government hospital, or at a particular private hospital instead of at some other private hospital, or at a private hospital abroad instead of locally, then he is entitled to recover the expenses incurred for medical treatment at the private hospital. Whether it is reasonable that he seeks or receives medical treatment at the private hospital must depend on the facts and circumstances of the case. Therefore in those cases where the courts decided that treatment in the particular private hospital was reasonable, the decision was correct in principle. What error there might have been was in the judge's assessment of the facts and circumstances, the facts and circumstances being insufficient or being not such as to warrant a finding of reasonableness. But it is not for us to pass judgment on the finding of reasonableness in these decisions because they are not on appeal before us and it was not necessary for us to do so to decide this appeal. Neither, I think, would it be wise, as my learned brother has attempted to do, to lay down a guide as to the circumstances in which it would be reasonable for a plaintiff to seek or receive treatment at a private hospital. One simply cannot foresee the likely ramification of circumstances. The law as to what is reasonable must be allowed to develop as cases are decided in the light of their own particular and peculiar circumstances. Incidentally, I should explain that the reason why

I have been speaking of a plaintiff seeking or receiving treatment, and not just seeking treatment, is because I am conscious of the possible existence of cases where it was not the plaintiff or his relatives that chose treatment at a private hospital, but the plaintiff happened to be brought there after an accident by disinterested persons when he was not in a state to make any decision, and was admitted and given treatment there.

[107] Having said that, I am constrained to say that *Chong Kam Siong v Herman bin Baharuddin* [1992] 2 CLJ 413 was decided on the wrong principle. In that case the accident occurred on 25 December 1988 at about 1.00 p.m. The plaintiff was taken to the Kota Tinggi District Hospital and then to the Sultanah Aminah Hospital, Johor Bahru, also a government hospital, where he regained consciousness at 2 or 3pm. (According to the learned judge at p 416c the plaintiff regained consciousness in the Sultanah Aminah Hospital on 12 December 1988, which would be an impossible date and must have been an error, and I take as correct the date in the headnote — the same day, that is 25 December 1988). At about midnight on the same day, he discharged himself and later was admitted to the National University Hospital in Singapore, which was taken in the case to be a private hospital. There he incurred medical expenses equivalent to RM43,073. The defendant's counsel argued that the plaintiffs act of discharging himself from the Sultanah Aminah hospital before he could be treated there, to seek treatment at a private hospital, was unreasonable. The judge allowed the claim of RM43,073. He acted on the principle of freedom of choice of medical treatment. He said (p 417e): 'In my opinion any ordinary citizen of this country has a right to choose medical treatment for his injuries and illness from whoever and from wherever'. Later on he said (p 417g): 'Applying the aforesaid principle of the freedom of choice, an injured victim in a road accident should also be granted the same right to choose where and by whom he wishes to be treated'.

[108] No one can question a person's right to spend money as he pleases to repair an injury done to him by another, but when it comes to claiming from the other the expenses incurred, what is permissible is only what is reasonable in the circumstances. The judge in that case, relying on the right, overlooked the principle of reasonableness and did not consider the question of reasonableness. That is why I say that the decision was reached on the wrong principle.

[109] I ought to mention that the judge had earlier said (p 417 c) that as regards the medical expenses there were two issues before the court: '(a) whether the plaintiff is entitled to medical treatment in a private hospital; and (b) if he is entitled, can he be treated in a hospital in Singapore'. It is to be observed that even the manner in which the issues were framed was apt to produce a decision on a wrong principle. The decision that I have set out was the decision on the first issue. As the issue was framed, of course the answer would be in the affirmative. A person is indeed entitled to treatment in a private hospital. The issues should have been framed: '(a) whether in the circumstances it was reasonable for the plaintiff to seek treatment in a private hospital; and (b) if it was reasonable, whether it was reasonable for the plaintiff to seek treatment in a private hospital in Singapore'.

[110] Since the decision as to treatment in a private hospital proceeded on the wrong principle and for that reason cannot stand, it follows that the decision on the second question as to treatment in a private hospital in Singapore also cannot stand even though the judge relied on an additional factor to justify the claim for the medical expenses in Singapore. He said that even though he was unable to confirm whether the quality of medical treatment in Singapore was better than that in Johor, he was of opinion that it would not be unreasonable for a person injured in Johor in a road accident to seek medical treatment in Singapore, and the reason he gave was the proximity and linkage of Johor to Singapore, so that a private hospital in Singapore should be treated like any other private hospital in Malaysia.

[111] Now, where it has arisen, the question of the reasonableness of seeking or receiving treatment in a private hospital has arisen as a contrast to seeking or receiving medical treatment in a government hospital, and it has so arisen on the basis of the commonly-known or assumed fact that, thus far, treatment in a government hospital is either free or far cheaper than treatment in any private hospital without the quality of treatment, generally speaking, being inferior to that in a private hospital. The question of seeking medical treatment in a private hospital in Singapore arose, where it has arisen, on the basis of the widely-known fact or widely-held belief that medical treatment in a private hospital in Singapore has so far been significantly more expensive than in Malaysia. In *Chong Kam Siong* it must have been on that basis that the question of reasonableness of seeking treatment in a private hospital in Singapore, as opposed to a private hospital in Johor or elsewhere in Malaysia, arose. The judge, in my view, was wrong when, in deciding that it was reasonable to seek medical treatment in Singapore, he relied on the consideration of proximity and linkage and entirely overlooked the obvious economic consideration of expense.

[112] There is next the question whether, if resort to or receipt of treatment at a private hospital is unreasonable, the plaintiff will be completely disentitled to the medical expenses incurred, as happened in *Chong Chee Khong*, or may still be awarded a portion of it. In this connection, I shall only refer to two decisions of the Supreme Court.

[113] In *Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor* [1988] 1 MLJ 19, which was not a motor accident case, the first respondent, a government servant, was awarded by the High Court RM80,000 as general damages (Award 'A') and two other awards (Award 'B'), namely, RM46,152 cost of plastic surgery and RM10,500 cost of psychiatric therapy treatment, both at a private clinic. On appeal, the Supreme Court decided as follows:

> At the conclusion of the hearing of the appeal in respect of the awards made in favour of the first respondent, we dismissed the appeal against Award 'A' on the grounds that in the special circumstances of this case we should not disturb the award although it would appear to be a bit on the generous side. We however allowed the appeal against Award 'B' because the awards are not tenable on the law and on the facts. The learned judge referred to the letter by DW 1 in respect of the medical treatment which she should be entitled to as government servant to receive in all government hospitals but nevertheless made the award based on the evidence

of the second respondent (the husband) who was 'unhappy' with an incident at a government clinic. The learned judge said in his judgment at p 16:

> 'She is entitled to free medical treatment in a government hospital. However in all the circumstances of this case I decided to allow her claim to have the surgery done at a private clinic. She had an unpleasant experience on a previous occasion at a government clinic.'

Psychiatric therapy treatment is also the type of treatment which is available in any government hospital. In any case the award (award (iii)) should be considered as absorbed in Award 'A'.

We therefore dismissed the awards on cost of plastic surgery and cost of psychiatric therapy treatment at a private clinic.

[114] It is to be observed that the Supreme Court did not expressly state the reason for dismissing Award 'B' completely or the principle behind the dismissal — apart from saying, without expressing any reason, that award (iii) (which could be the cost of psychiatric therapy) should be considered as absorbed in Award 'A' — although reading the passage it may be inferred that the Supreme Court considered that if the first respondent had sought treatment at a government hospital she would not have incurred any expenses at all. It does not appear that the question was considered whether, as a matter of principle, the first respondent ought to be awarded some portion of the medical expenses incurred at the private clinic even though she would have been entitled to free treatment at a government hospital. I should regard the decision as one made according to the circumstances of the case and not as one that lays down a binding principle, even for a government servant, that where resort to treatment at a private hospital is not reasonable, the plaintiff is completely disentitled to claim the medical expenses incurred.

[115] I am heightened in my feeling that I am on safe ground in saying so because in the other case that I wish to mention the Supreme Court allowed a portion of the expenses incurred. It was an appeal from the decision of the High Court in *Mooi Kim Ming & Anor v Tang Sia Bak* [1988] 2 CLJ 797. In that case the second plaintiff discharged himself from the General Hospital, Ipoh, against medical advice and had himself admitted to the Hospital Fatimah the same day. According to the judge, the second plaintiff discharged himself from the government hospital 'apparently to get better treatment at Hospital Fatimah', Those are the only facts available from the judgment concerning the change of hospital. The judge did not think that the second plaintiffs action could be regarded as unreasonable and ruled that he was entitled to the amount of medical expenses claimed of RM5,576.30.

[116] The defendant appealed to the Supreme Court in Civil Appeal No 249 of 1987. The Supreme Court reduced the award to RM1,500. In the law reports, there is available only a summary of the case and of the award on appeal. It is published in the January 1989 issue of the *Butterworth Law Digest*, entry or para 85, as *Tang Sia Bak v Mooi Kim Ming & Anor*. The editor's note says this:

> The Supreme Court reduced the High Court award of M$5,576.30 to M$ 1,500 as medical expenses in respect of the second respondent. The sum of M$5,576.30

represented the sum claimed by the second respondent as medical expenses incurred at a private hospital. Their Lordships in the Supreme Court held that it was unreasonable on the part of the second respondent to discharge himself from the general hospital where he was first admitted to seek similar treatment at the private hospital.

[117] Although the Supreme Court found that the switch in hospitals was unreasonable, their Lordships still awarded a portion of the medical expenses claimed. They did not specify the proportion, but the amount awarded amounted to less than one-third of the amount claimed. It is not known on what principle or basis they arrived at the reduced figure.

[118] So on the question whether, if a plaintiff discharges himself from a government hospital and seeks treatment in a private hospital and his action is unreasonable, he ought to be denied entirely the medical expenses incurred at the private hospital, the answer is that there is a precedent set by the Supreme Court for allowing a portion of the medical expenses, which is not one-third and need not necessarily be one-third. But there is no authority that lays down, as principles backed by reasons, whether the medical expenses ought to be allowed at all, or, if they are to be allowed partly, what the considerations are for doing so and for determining the portion that is to be allowed, and I am not prepared to state an opinion on this because the question has not been examined in the appeal. I confess, however, that at the time when the appeal was decided I viewed the case of the plaintiff, who did not, after being properly discharged from the government hospital, make the required follow-up visits to it but sought treatment at the private hospital, as belonging to the category of cases of discharge from a government hospital to seek treatment at a private hospital, and I was prepared, on the basis of *Tang Sia Bak* and in view of the concession of the defendant's counsel in his alternative submission, to rule that the plaintiff be awarded one-third of the medical expenses claimed if his action was unreasonable. I felt then that even if his action was unreasonable he ought not to be deprived entirely of the medical expenses incurred at the private hospital.

[119] The last thing that I have to say on this subject concerns my learned brother's opinion to the effect that if a plaintiff is justified in seeking treatment at a private hospital, as opposed to treatment at a government hospital, he must further prove the reasonableness, from the point of view of comparative charges of private hospitals, of the choice of the particular private hospital. In a genuine case where treatment at a private hospital, as opposed to treatment at a government hospital, is reasonable, it ought not to be too difficult for a plaintiff to prove it. It will be a matter of showing the relative circumstances prevailing in two sectors, the government hospital sector and the private hospital sector, and the needs of the plaintiffs condition. But I fear that to require the plaintiff to prove that the choice of the particular private hospital out of other private hospitals is reasonable in terms of charges in order for him to be able to claim in full the charges incurred at the particular private hospital may be placing on a plaintiff too heavy a burden of making a survey among private hospitals before making his choice in order to be able to claim the full expenses. It will have to be a choice, for example, of a

private hospital that fulfils the needs of the case, but is not necessarily the cheapest, because the cheapest may, due to distance, not be convenient for the plaintiff. In a time of dire need, such a survey may not be practical. In actual reality, it may be that the matter is quite simple, but until I am myself acquainted with the reality I am chary of imposing such a burden on a plaintiff. Of course, it may be shown that the particular private hospital has been chosen upon considerations that are not reasonable in view of its charges, but that is different from placing on the plaintiff the burden of proving that the choice is reasonable.

Loss of future earnings

[120] As to loss of future earnings, my learned brother has set out the judge's reasoning and the plaintiffs evidence. The judge based his reasoning on the premise that the plaintiff was a mining worker, But although the plaintiff was serving in a mine, he was basically a tractor driver and the evidence showed that his injuries did not affect his work as a tractor driver and that, after his recovery, he was earning more as a tractor driver than he had been earning in the mine where he was injured. For those reasons, I was of the view that there should have been no award for loss of future earnings.

Appeal allowed.

Reported by Lim Lee Na